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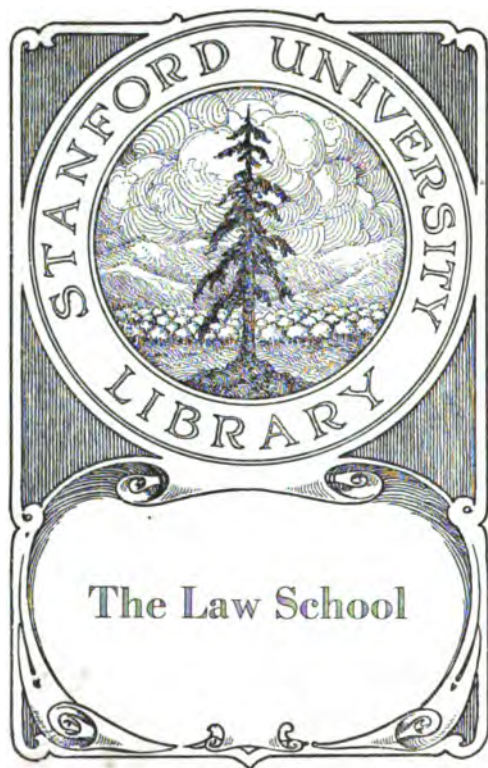
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H. L. GILLASPIE.









REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
English Courts of Common Law.
Millar's

HERETOFORE CONDENSED BY
HON. THOMAS SERGEANT AND HON. THOMAS M'KEAN PETTIT

Now Reprinted in Full.

VOL. XLVII.

CONTAINING

*Cases at Nisi Prius in the Courts of Queen's Bench, Common Pleas, and Exchequer; together
with Cases tried on the Circuits, and in the Central Criminal Court: from
Hilary Term, 6 Vict., to Trinity Term, 8 Vict.*

PHILADELPHIA:
T. & J. W. JOHNSON & CO., LAW BOOKSELLERS,
NO. 585 CHESTNUT STREET.

1870.

359653

WARRIL, CLARA

REPORTS OF CASES

ARGUED AND RULED AT

NISI PRIUS,

IN THE COURTS OF

QUEEN'S BENCH, COMMON PLEAS, AND EXCHEQUER;

TOGETHER WITH CASES TRIED ON

THE CIRCUITS,

AND IN

THE CENTRAL CRIMINAL COURT:

FROM

HILARY TERM, 6 VICT., TO TRINITY TERM, 8 VICT

BY

F. A. CARRINGTON, ESQ.

OF LINCOLN'S INN,

AND

A. V. KIRWAN,

OF GRAY'S INN, ESQ., BARRISTERS AT LAW.

VOL. I.

PHILADELPHIA:

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1870.



A

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1890

CASES
AT
NISI PRIUS.

Hillaspie

COURT OF QUEEN'S BENCH.

Sittings at Westminster after Hilary Term, 1843.

BEFORE LORD DENMAN, C. J.

BEALE v. MOULS, GOLDNEY, HULLMANDELL, EKin, HER-
RING, PARRY, WATSON, and THEOBALD.

An action for goods sold and delivered had been brought against three, who pleaded in abatement the non-joinder of P. and four other persons. The plaintiff did not take issue on that plea, and brought another action against the eight, in which P. pleaded, separately, non assumpsit. At the trial, the counsel for two of the original defendants, in his address to the jury, proposed to go into evidence to prove that one of them was not liable, and also to prove under the stat. 3 & 4 Will. 4, c. 42, s. 10, that P. was liable. P.'s counsel asked to be allowed to address the jury after the proposed evidence was given, instead of before, and it was held that he might do so.

ASSUMPSIT for goods sold and delivered, for work and materials, money paid, interest, and on an account stated. The declaration commenced in the form prescribed by the Rule of H. T. 4 Will. 4, No. 20, as to declarations after a plea in abatement of the non-joinder of other persons when the plaintiff has not proceeded to trial on an issue thereon.

*Plea, by the defendants Moulds and Hullmandell, non assumpsit. Plea, by each of the other defendants separately, (except the defendant Watson,) non assumpsit. The defendant Watson suffered judgment to go by default.

It appeared that the present action was brought by the plaintiff for a balance of account for the price of a steam-carriage constructed according to the principle of Colonel Maceroni's patent, and made for the committee of the Common Road Steam Conveyance Company, of which committee it was alleged that all the present defendants were members. It appeared that the action had originally been brought against the defendants Moulds, Goldney, and Hullmandell only, and that they having pleaded in abatement the non-joinder of the other five defendants, the present action was brought against the eight present defendants.

At the close of the plaintiff's case, *Butt*, for the defendants Herring and Theobald, took two objections, on which leave was given to him to move to enter a nonsuit. He then addressed the jury for those defendants, and

Goldney also addressed the jury, but
Mouls and Hullmandell, addressed the
Mr. Benningfield as a witness to show that
a member of the committee at the time when
and that the defendant Parry, one of the parties,
in consequence of the plea in abatement,) (a)
committee.

Parry.—I submit that I ought to be allowed
after the evidence has been adduced by which
to affect my client, who was only made a
of the plea in abatement. That evidence being
the interests of my client as any evidence that could be
of the plaintiff; I ought therefore in fairness to have
marking on it.

Parry.—I submit that this cause must be tried like any
action for goods sold with pleas of the general issue
defendants except the one who has allowed judgment
and the counsel for each defendant ought to address the
witnesses for either of the defendants are called.

C. J.—I think that Mr. Fortescue's application is reason-
to be allowed.

called Mr. Benningfield as a witness, and having done so,
C. J., called on Fortescue to address the jury for the
Parry, which he declined doing, as, on the evidence of Mr.
the defendant Parry was clearly shown to have been a member
of the committee at the time of the ordering of the carriage.

Verdict for the plaintiff, with leave to move to enter a nonsuit.

and Simeon, for the plaintiff.

and G. H. Hodgson, for the defendants Herring and Theobald.

and Smith, for the defendant Goldney.

E. Jones, for the defendants Mouls and Hullmandell.

Fortescue, for the defendant Parry.

In the ensuing term, Butt moved in pursuance of the leave given at the
trial, and obtained a rule to show cause why a nonsuit should not be
entered, which after argument was made absolute.

(a) Under the stat. 3 & 4 Will. 4, c. 42, s. 10.

First Sitting at Westminster in Trinity Term, 1843.

BEFORE MR. JUSTICE WIGHTMAN.

HOLCROFT v. BARBER and WATSON.

In an action for wrongfully dismissing the editor of a newspaper, the declaration stated
that he was engaged for a year. There was no direct evidence as to the time for
which the plaintiff was engaged:—Held, that the plaintiff might go into evidence to
show a custom for editors of newspapers to be engaged for a year, unless there was
an express stipulation to the contrary.

Scilicet, that the custom is, that the engagements of editors, sub-editors, and reporters
of newspapers are for a year, unless there be an express stipulation to the contrary,
and that this custom is binding on both parties.

ASSUMPSIT.—The declaration stated, that, on the 1st day of January, 1842, “in consideration that the plaintiff, at the request of the defendants, would enter into the employ of the defendants, *in the capacity of editor* of a certain periodical publication or newspaper called *The Monthly Times*, for a certain time, to wit, for one whole year, commencing, to wit, on the day and year aforesaid, at and for a certain salary and wages, to wit, £10 per month,” the defendants promised the plaintiff to retain and employ him, *in the capacity aforesaid*, at and for the salary and wages aforesaid, and to continue him in such employ for the said time, to wit, for one whole year, commencing, to wit, on *the day and year aforesaid; and although the plaintiff, confiding, &c., did afterwards enter into the [*5 employ of the defendants, “in the capacity aforesaid,” yet the defendants wrongfully dismissed him within the year. Plea—Non assumpsit.

It appeared, that, in the month of December, 1841, the defendants were about to commence the publication of a newspaper called *The Monthly Times*, which was to be printed in London once a month, and sent to India; and that the plaintiff wrote the leading articles of the paper from the month of January, 1842, to the month of June, in the same year, both inclusive, for which he was paid £10 for each month.

It appeared, from the evidence of Mr. Kelly, the printer of the paper, that Mr. Stephenson was the person who had the management of the paper; and he stated that Mr. Stephenson was the editor of it, and had, on one occasion, rejected a part of a leading article which had been written by the plaintiff. With respect to the engagement of the plaintiff being for a year, there was no direct evidence except the following letter, written by Mr. Stephenson to the plaintiff:—

“*Saturday, December 11, 1841.*

“My dear Holcroft—Can you, without much trouble, look in on Monday at 11 or 12. It is too long to write about; but refers to another opening for your putting about £120 a year, additional, into your pocket.

“Ever sincerely yours,

“R. MACDONALD STEPHENSON.

“P. S.—Legitimate business, and not speculation!!!!”

A letter (without date) of the defendant Barber to the plaintiff was also put in. It contained the following passages:—“We regret to say, that the last mail does not bring us satisfactory accounts of our spec. as regards *the *Monthly Times*; and we are, therefore, constrained to forego the *Monthly Summaries*, for which we have been indebted to your [*6 good offices.” “We are desirous to express the proprietor’s full approbation of the style and matter which your pen has furnished.”

Platt, for the plaintiff, proposed to call witnesses to show that there was a custom that editors, sub-editors, and reporters of newspapers were engaged for a year, unless it is otherwise expressed at the time of making the engagement.

Crowder, for the defendants.—I submit that the evidence is not receivable. This is a matter of contract only, and not a matter of custom, any more than hiring a groom—one master may hire his servants on certain terms, and another upon quite different terms, just as they may agree with their servants.

Platt.—In the case of a groom, the usage is a month’s wages, or a month’s warning. Evidence of usage always has been received.

WIGHTMAN, J.—You may go into evidence to show a custom.

Mr. Powell was called.—He said the custom is, that the engagements of editors, sub-editors, and reporters upon newspapers are annual, unless expressly stated to be otherwise.

WIGHTMAN, J.—Does your custom apply to contributors, who are neither editors, sub-editors, or reporters?

Mr. Powell.—To persons engaged to regularly supply the leading articles.

*7] WIGHTMAN, J.—Then it stands thus,—that engagements of editors, sub-editors, reporters of newspapers, and persons who are engaged to regularly supply the leading articles of newspapers, are for a year, unless otherwise expressed. That would be so in the case of a clerk or servant.

This custom was also deposed to by Mr. James Woods and Mr. Knox, who had both of them been many years connected with newspapers; but none of the witnesses knew of any instance of the custom being applied to a newspaper which came out once a month. They also stated, that the person who wrote the leading articles they should consider as the editor of a newspaper, and that the person who had the management of the paper they should rather consider as a sub-editor; but that, on many publications, particularly on the great London newspapers, there were several persons who were editors and who took different portions of the editorship, and that therefore in such cases no one person would be considered as the editor.

Crowder, for the defendants, addressed the jury, and submitted—first, that the plaintiff was not engaged by the defendants “in the capacity of editor,” as stated in the declaration; and secondly, that the custom deposed to by the witnesses as to the engagements of editors, sub-editors, and reporters, did not apply to a paper published once a month to be sent abroad, this being a new species of paper published on speculation, and not a newspaper on which the engagements would be permanent.

WIGHTMAN, J. (in summing up).—There are two questions in this case—first, did the defendants engage the plaintiff as the editor of this publication, for, if the plaintiff was not engaged as the editor, he must fall *8] in this action, as he is described in the declaration as having been so engaged; and secondly, if he was engaged as the editor, was he engaged for a year by express words, or by any custom which prevails in the business, though nothing was said in express words as to the duration of the engagement? On the first point Mr. Kelly, the printer, says that Mr. Stephenson was the editor; and he also states that Mr. Stephenson had the management of the paper, and rejected a part of one of the plaintiff’s articles. There is no doubt that the plaintiff was a contributor to the paper, and that he wrote the leading articles, subject, as appears in that instance, to the control of Mr. Stephenson. There are several witnesses who state that they consider that the plaintiff was the editor notwithstanding this, and that Mr. Stephenson was rather the sub-editor, but it is difficult to reconcile this with the statement that Mr. Stephenson had the power of rejecting the articles written by the plaintiff; and you have the direct testimony of Mr. Kelly that Mr. Stephenson was the editor, and the fact that in no part of the correspondence is the plaintiff spoken of as the editor. If you think that the plaintiff was not the editor, and did not fill the situation designated in the declaration, your verdict should be for the defendants; but if you think that the plaintiff did fill

the situation mentioned in the declaration, you will then consider whether there was an engagement for a year. The paper came out once a month, and the plaintiff was paid £10 per article, and the letter of Mr. Stephenson speaks of its being about £120 a year; but, as twelve articles at £10 each would be £120 a year, this does not necessarily show that the engagement was for a year. This brings us to evidence of the custom; and on this part of the case it is proved by a number of gentlemen who have been employed both as editors and sub-editors, that the custom is, that a person who is upon the regular employ of the newspaper press, is employed for a year, unless it be otherwise expressed; but there seems to be some doubt whether that custom applies to a paper like *the present, as this is the rather anomalous case of a paper published [*9 only once a month, and to be sent to India as a sort of speculation, for we find the word "spec." is used in one of the letters. The witnesses, however, all agree that it is not so much whether the person is called editor, sub-editor, or reporter, but that if the person be permanently employed, (not occasionally only,) to supply a particular department of a newspaper, as, for instance the leading article, or reports of the parliamentary debates, and no more be said, that is an engagement for a year; and if the engagement be for a year, that engagement is reciprocally binding on both parties. You will first say whether the plaintiff was engaged as the editor of the paper, as stated in the declaration; and if he was, you will then say whether by the custom a person who is so employed is engaged for a year, unless it be otherwise expressed.

Verdict for the defendant; the foreman of the jury adding, "We do not consider that Mr. Holcroft was the editor."(a)

Platt and Thomas, for the plaintiff.

Crowder and Barstow, for the defendant.

(a) The following case being on the same subject, we have subjoined it.

*COURT OF COMMON PLEAS.

Sittings at Westminster after Michaelmas Term, 1843.

BEFORE LORD CHIEF JUSTICE TINDAL.

BAXTER v. NURSE.

Seem, that the usage is, that the engagements of editors, sub-editors, reporters, and other persons who are regularly employed on newspapers, are for a year, unless there be an express agreement to the contrary.

In an action for wrongfully dismissing the editor of a periodical work within the year for which he was alleged to be engaged, the declaration stated that the plaintiff was engaged for a year, at a salary of three guineas per week, to be raised one guinea for every thousand copies sold. It was objected that the terms of the contract, as to the rise of salary, were not proved. The judge, being of opinion that there was some evidence of the contract as laid, left the case to the jury, and said that, if they found that the contract was not on the terms as to salary which were alleged in the declaration, he should not allow an amendment, but would have the finding of the jury stated on the record, under the stat. 3 & 4 Will. 4, c. 42, s. 24.

ASSUMPSIT.—The first count of the declaration stated, that on the 7th of January, 1843, in consideration that the plaintiff, at the request of the defendant, would enter into the service and employ of the defendant in the capacity of editor of a certain periodical publication of the defendant, called "The Illustrated Polytechnic Review," for a certain time, to wit, for one whole year, commencing, to wit, on the day and year aforesaid, at and for a certain salary and wages, to wit, the salary and wages of 3*l.* 3*s.* per week, to be raised to 4*l.* 4*s.* per week when the circulation of the publication reached 1000 copies, and the said wages and salary to be further raised 1*l.* 1*s.* per week for each additional 1000 copies circulated weekly, until the weekly circulation amounted to 7000, he, the defendant, then promised to retain and employ the plaintiff in such

capacity of editor as aforesaid. This count then went on to aver, that the plaintiff did enter into the employ of the defendant on those terms, and that the defendant wrongfully dismissed him within the year. The declaration also contained counts for work and labour, money paid, and on an account stated. Pleas—*first*, except as to the sum of £50, parcel of the money in the second and subsequent counts mentioned, non assumpsit: *second*, to the first count, “that after the plaintiff had been and was retained by the defendant, and whilst he was so acting in the capacity of editor of the said ‘Illustrated Polytechnic Review,’ and before the defendant dismissed the plaintiff from his service and employ, as in the first count of the declaration mentioned, the plaintiff behaved and conducted himself in a gross, careless, and improper manner, as such editor as aforesaid, and conducted, and edited, and published the said ‘Illustrated

“Polytechnic Review” in an improper manner, in this—to wit, that he, the plain
*11] tiff, wrongfully and injuriously printed and published in the said ‘Illustrated Polytechnic Review’ divers articles, papers, matters, and writings which had been and were printed, copied, extracted, and taken from and out of certain other works and papers, without the consent of the authors or proprietors of such last-mentioned works and papers, without acknowledging, in the said ‘Illustrated Polytechnic Review,’ the source from which he, the said plaintiff, had so pirated, copied, extracted, and taken the said articles, papers, matters, and writings, and thereby brought the said Review into disrepute, and injured the sale and circulation, and thereby then also subjected the defendant, and rendered him liable to divers actions and suits, for piracy, at the suit of divers persons whose names are to the defendant unknown—and the plaintiff then also neglected and refused to insert in the said ‘Illustrated Polytechnic Review’ divers articles, which he, the defendant, requested might be inserted therein—and then, also, wrongfully and injuriously printed and published a larger number of copies of the said Review, to wit, 5000 copies more than were necessary or proper in that behalf—and inserted in the said Review divers improper articles, wherefore the said defendant, at the time when, &c., in the said first count of the declaration mentioned, committed the said breach of promise in the said first count mentioned, as he, the defendant, lawfully might do for the cause aforesaid,” (concluding with a verification.) *Third*, as to the sum of £50, parcel of the money in the second and subsequent counts mentioned, a payment into Court of that sum, and that the plaintiff had sustained no greater damages. Replication to the first plea, a similitur; to the second plea, *de injuriâ*: and, as to the third, the plaintiff accepted the money paid into Court, and entered a *nolle prosequi* as to the second and subsequent counts.

It was opened by *Wilde*, Serjt., for the plaintiff, that the defendant had engaged the plaintiff, Dr. Baxter, as editor of the “Illustrated Polytechnic Review,” at a salary of three guineas per week, to be raised, as stated in the declaration; but that, after the plaintiff had acted in that capacity for three weeks, the defendant dismissed him, which the plaintiff contended he had no right to do, as not only by law was a general hiring to be presumed to refer to a year, but also by the usage in such cases the engagements of editors of newspapers and periodical publications were engagements for a year, unless an express agreement for a shorter term was entered into.

On the part of the plaintiff, Mr. Landels was called. He said, “I know the plaintiff and defendant. In consequence of seeing an advertisement, I applied to them to do engraving for the ‘Illustrated Polytechnic Review.’ I saw them both at the Polytechnic Institution; they told me that Mr. Nurse was to be the proprietor, and Dr. Baxter the editor. Mr. Nurse said, Dr. Baxter’s engagement was three guineas a week, and to be progressive according to sale.”

It further appeared, that the publication was intended to be a *scientific review,
*12] published weekly, at the price of 4d., with engravings; and with respect to the usage as to the engagement of editors of newspapers and periodical publications being annual where no time is mentioned, it was proved by Mr. Vincent Dowling, that he had been connected with the newspaper press for forty years, and that the usage was, that the engagements of editors, sub-editors, reporters, and all who are regularly employed on newspapers, are for a year, unless there was an express agreement to the contrary; but Mr. Dowling also stated, that he knew of no instance in which an editor had been engaged for a year on a new publication, and that it often happened that new periodical publications were commenced which did not last six months. It was also proved by Mr. Griffin, Mr. James Woods, Mr. Aykbowen, Mr. O’Brien, and several other witnesses, who had all of them been engaged as editors, sub-editors, and reporters for the *Times*, and other newspapers, that the usage was for the engagement of an editor, sub-editor, or reporter to a newspaper, to be for a year, unless it was otherwise expressly stipulated.

Talfourd, Serjt.—I submit that the contract stated in the declaration is not proved.
Bonpas, Serjt.—Even if that be so, it would be amendable.

TINDAL, C. J.—I think there is some evidence to go to the jury of the contract, as stated in the declaration. If the jury should find that the contract is not as stated in the declaration I shall certainly not allow an amendment, but I would have the facts specially found, and the finding stated on the record under the statute 3 & 4 Will. 4, c. 42, s. 24, (set out 6 C. & P. 531.)

Talfourd, Serjt., for the defendant, in addressing the jury, contended, that, however the usage deposed to by the plaintiff's witnesses applied to the editor of an established London daily or weekly newspaper, it could not apply to the editor of a publication like the present, which was really not a newspaper, but a review, which was published at a cheap price, and which, as it was an experiment, might be discontinued entirely before the end of a year, or might not last six weeks, as was the case with many newly projected publications. But however that might be, evidence would be given to show, that the defendant was justified in terminating the engagement of the plaintiff within the year, even if the engagement were an annual one.

Evidence was given for the defendant in support of the second plea.

TINDAL, C. J. (in summing up).—The questions in this case are—first, whether there was an engagement of the plaintiff for a year; and secondly, whether the defendant has substantiated his second plea, and has shown his right to terminate the engagement before the end of the year. The general rule of law is, that when there is nothing to contradict it, if a person engages another upon a service that is in its nature a lasting and enduring service, the engagement is for a year: but the law always looks at the nature of the contract, and therefore, the plaintiff has in this case adduced a considerable body of evidence to show, that, in the cases of editors, sub-editors, reporters, and other persons regularly employed on newspapers, it is always understood and acted upon by all parties, and the general usage is, for the engagement to be for a whole year; and there is no doubt that where there is a general understanding, and a course of dealing, and agreements are made, without any specific stipulation to vary them from such general course of dealing, they are included in it. It has been said by my brother **Talfourd**, that the usage which has been proved by the plaintiff's witnesses, although applicable to the London daily and weekly newspapers, does not apply to a publication like that which the plaintiff was engaged to edit. Still, the evidence that has been adduced is very proper for you to take into your consideration in determining whether or not the plaintiff's was an engagement for a year. [His Lordship then summed up the case, as to whether the contract, as stated in the declaration, was proved, and as to the plea justifying the putting an end to the engagement within the year.] [*13]

Verdict for the defendant, the jury finding, that the plaintiff was not engaged for a year; that the contract was only for three guineas a week, and not as stated in the declaration; and also, that the defendant had made out his second plea.

Wilde, Bompas, and Channell, Serjts., and **Humfrey**, for the plaintiff.

Talfourd, Serjt., and **Rawlinson**, for the defendant.

In the ensuing term, **Bompas, Serjt.**, applied for a new trial on the ground of misdirection, and on the ground that the verdict was against evidence; but the Court refused a rule, on **Talfourd, Serjt.**, consenting that a verdict should be entered for the plaintiff on the second issue, because the evidence given on the trial did not sustain the second plea.

*THE THEATRE ROYAL DRURY LANE COMPANY OF PROPRIETORS v. CHAPMAN. [*14]

The Company of Proprietors of Drury Lane Theatre [made a corporation by the stat. 50 Geo. 3, c. cxxiv, loc. and pers.] in 1836 leased the counters of the saloon of the theatre and the privilege of selling fruit, &c., to Mrs. M. C. for seven years. She died in 1837, and her son, the defendant, soon after applied to the committee of the theatre to become tenant on the same terms as the lease, and they accepted him. He occupied down to January, 1843, and paid rent down to the latter part of 1841:—**Held**, in an action for use and occupation, that it was a question for the jury whether the defendant had occupied as assignee of the lease to his mother, or upon a fresh taking upon the same terms as the lease, and, if the latter, he was liable in the present action: and held, also, that he would be so liable, although in April, 1843, he and his brother had taken out letters of administration to Mrs. M. C., (therein described as a feme covert at the time of her death,) and also to her husband, who

had survived her. *Held*, also, that it was no ground for reducing the damages, that, in 1841, the plaintiffs had let the theatre to Mr. M. "subject to the rights" of the defendant, and that Mr. M. had made regulations as to the theatre and its saloon which caused a loss of profit to the defendant, unless those regulations were made by the authority of the plaintiffs, or of persons acting for them and by their authority.

DEBT for use and occupation "of certain rooms, offices, fires, fire-places, and counters in the Theatre Royal Drury Lane, and for the liberty and privileges of selling fruit, tea, coffee, and other refreshments, and books of the plays in the said theatre." Plea—*Nunquam indebitatus*.

It was opened by *Knowles*, for the plaintiffs, that the plaintiffs were incorporated under an act of Parliament, [50 Geo. 3, c. ccciv., loc. and pers.,] (a) and that the defendant had occupied what were called the Fruit Offices of Drury Lane Theatre, with the use of the counters in the saloon of that theatre, and the privilege of selling fruit and refreshments there, for which he was to pay the plaintiffs £400 a year: that, on the 1st of January, 1843, a balance of £450 was due for a year and a half's rent, after deducting a sum of £150 which had been paid. The defendant *15] intended to object to the form of the present *action on the ground that he held under a lease, and also to object that the business in the saloon of the theatre was lessened by reason of the lessee of the theatre, Mr. Macready, having made regulations by which a particular class of ladies were excluded from the saloon.

It was proved by Mr. Dunn, the secretary of the plaintiffs, that the defendant had occupied the counters of the saloon of Drury Lane Theatre, and what were called the fruit offices, from the year 1837, and paid a rent of £400 a year, to the 1st of July, 1841; but, in answer to questions put by *Platt*, for the defendant, Mr. Dunn said, "There was a lease of the same property and privileges that the defendant had at the theatre. This lease was granted to Mrs. Mary Chapman, the mother of the defendant, who died in the month of January, 1837. The defendant paid the rent of the half-year in which his mother died. The lease is not expired by lapse of time. The defendant, soon after his mother's death, applied to the committee to take him as their tenant, on the same terms as the lease, and they accepted him." (b)

Platt, for the defendant.—I apprehend that the lease must be produced, to show the terms.

WIGHTMAN, J.—The plaintiffs must produce the counterpart of the lease. The defendant is to hold on the same terms as the lease, and we must see what these terms are.

The counterpart of the lease was proved, and put in. It was a lease dated the 30th July, 1836, from the plaintiffs to Mary Chapman, of the use of the counters of the saloon of the theatre, and the exclusive right of selling fruit, tea, coffee, and such other refreshments, and also books of the *16] plays, when permitted by the authors, as have been usually *furnished or sold in the theatre, and the liberty of using certain fire-places, for seven years.

(a) In the case of *The Mayor of Stafford v. Till*, 12 Moore, 260, which was an action for the use and occupation of a house and premises, the Court of Common Pleas held that a corporation aggregate might maintain assumpsit for use and occupation where the tenant has occupied premises under them and paid rent. And in the case of *The Mayor and Burgesses of Carmarthen v. Lewis*, 6 C. & P. 608, it was held that a corporation aggregate might maintain assumpsit for the use and occupation of tolls, though they did not grant the tolls to the occupier by any instrument under their common seal.

(b) Mr. Dunn did not give the date of this transaction

Platt, for the defendant.—I submit that the present action cannot be maintained. The defendant came in at the death of his mother under the lease granted to her, and he is therefore to be treated as the assignee of the lease, and the plaintiffs' remedy must be on the lease, and no action for use and occupation will lie.

WIGHTMAN, J.—The capacity in which the defendant held is one of the questions which I shall leave to the jury.

Platt addressed the jury for the defendant.—The lease to Mrs. Chapman is a subsisting lease, and, being by deed, it cannot be got rid of by parol or by any thing but another deed, and the whole of Mrs. Chapman's interest in the property is in her representatives. I shall put in letters of administration to Mrs. Chapman granted to the defendant and his brother Mr. Frederick Chapman; and they therefore have all their mother's interest in the property till the lease expires, and they and they alone are suable on the lease, which is by deed, and not in an action for use and occupation. But even conceding that the action for use and occupation would lie, the tenant is not liable if the premises are rendered valueless; and it will be shown that since the making of certain regulations by Mr. Macready, the lessee of the theatre, the saloon has been rendered valueless to the defendant.

Letters of administration of the effects of Mrs. Mary Chapman, dated the 18th of April, 1843, granted to the defendant and his brother Mr. Frederick Chapman, were put in. The letters of administration stated that Mrs. Chapman had a husband who survived her. (a)

*Letters of administration of the same date of the effects of Mr. George Chapman (husband of Mrs. Chapman) granted to the de- [17
fendant and his brother were also put in. (b)

It was proved that the sale of refreshments at Drury Lane Theatre had very much decreased in the years 1841 and 1842, after the regulations made by Mr. Macready for the exclusion of women of improper character from the saloon of the theatre, and after the regulations made by him preventing the fruit-women from going into the pit of the theatre to sell fruit there. But it was proved by Mr. Macready that he had taken the theatre of the defendant in the year 1841, "subject to the rights" of the defendant, and that he made these regulations of his own authority.

Knowles, in reply.—It is quite clear from the evidence that the defendant occupied this property not as assignee or representative of his mother

(a) Lord Coke says, (1 Inst. 3 a.) "A feme covert cannot take any thing of the gift of her husband, but is of capacity to purchase of others, without the consent of her husband; and of this opinion was Littleton, in our books, and in this book, sect. 677, but her husband may disagree thereunto, and devest the whole estate, but if he neither agree nor disagree, the purchase is good; but, after his death, albeit the husband agreed thereunto, yet she may, without any cause to be alleged, waive the same; and so may her heirs also, if, after the decease of her husband, she herself agreed not thereunto." With respect to a wife taking any thing of the gift of her husband, Messrs. Hargrave and Butler, in their note on this passage, say, "But this doctrine must be understood with various limitations. 1. Though the husband cannot convey to the wife immediately, yet he may give to a trustee, for her benefit, and the gift will be good. Therefore, he may convey land to her by way of use, as by enfeoffing or covenanting with another to stand seised, or surrendering a copyhold to her use. 2. According to some books, by custom of a particular place, or of York, the wife may take by immediate conveyance from her husband. 3. The husband may give to his wife by last will, because such gift cannot take effect till his death, when the coverture is determined. 4. It seems that a donatio mortis causa by husband to wife may be good, because that is in the nature of a legacy.

(b) The time of Mr. George Chapman's death did not appear.

*18] for the remainder of her *term under the lease, but as yearly tenant, having made a new and separate bargain for himself, and this is quite manifest, as the letters of administration are dated in April, 1843, and the present action was commenced before that time,^(a) and the administration was, therefore, an after thought to defeat the present action; and with respect to the other ground of defence, that the defendant's profits have been diminished by Mr. Macready's arrangements, it is not at all shown that that is in any way attributable to the plaintiffs; indeed, Mr. Macready himself has stated that he took the theatre subject to all the defendant's rights and privileges, and even assuming that Mr. Macready had exceeded his authority in respect of the defendant's rights, that is no reason why the defendant should not pay his rent to the plaintiffs.

WIGHTMAN, J., (in summing up.)—The first question in this case which I shall leave to you is, whether you are satisfied that, after the death of Mrs. Mary Chapman, the defendant entered into a new contract with the Committee of Drury Lane Theatre, to hold this property and these privileges on the same terms as the lease; and whether the defendant held under such new taking, or whether he entered into possession after the death of his mother under the lease itself. With respect to the second point, as to the defendant's alleged loss of profits in consequence of Mr. Macready's regulations, I am of opinion, that unless the defendant was deprived of his profits by some default of the plaintiffs, or of those who represent them, and act by their authority, such loss of profits is no defence to the present action; you will, therefore, tell me whether you think what Mr. Macready did, was done by the authority of the plaintiffs, and I also wish you to say how much the property and privileges of the defendant were, in fact, deteriorated by *the changes which took

*19] place in the arrangements of the theatre.

Verdict for the plaintiffs; and the foreman of the jury said, "We consider it a new taking; and we think that the alterations were not made with the authority of the plaintiffs, but by Mr. Macready's own authority; and with respect to the third question, we consider that a deduction of £150 should be made."

WIGHTMAN, J.—The other facts being found as they are by the jury, I am of opinion that the defendant is not entitled to any deduction at all, and that the verdict must be entered for £450; and I shall give Mr. Platt leave to move to reduce the damages to £300, if the court think the deduction of £150 can be made.

The verdict was entered for the plaintiff; damages £450.

Knowles and Corrie, for the plaintiffs.

Platt and Hugh Hill, for the defendant.

On a subsequent day, *Platt* applied for a rule to show cause why there should not be a new trial, or why the damages should not be reduced; but the court, after taking time to consider, refused a rule.

(a) The declaration in the present action was dated 28th of March, 1843, and the plea the 24th of April, 1843.

*Sittings in London after Trinity Term, 1843.

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BEFORE LORD DENMAN, C. J.

TOWNEND and Others v. DRAKEFORD.

Where, on a sale of goods, bought and sold notes are given, the bought and sold notes constitute the contract between the parties, and not the entry of the contract made by the broker in his book. But if there be no bought and sold notes, the entry in the broker's book may be resorted to.

If there be a material discrepancy between the bought and sold notes, there is no contract.

Where the bought note of 405 chests of India sealing-wax contained the terms "Prompt 25th June, brokerage 1 per cent., deposit 15l. per cent., payable 2d April," and the sold note was "Prompt 25th June, brokerage $\frac{1}{2}$ per cent.," and the deposit wholly omitted:—*Held*, that this was such a discrepancy between the bought and sold notes as to make it no contract, although, with respect to the brokerage, it was stated by one of the special jury that the buyer would pay the broker one per cent., and the seller half per cent.

Whether the signing of bought and sold notes by the clerk of the broker is sufficient.
Quere.

TROVER for sealing-wax—Pleas, 1st, not guilty; and 2d, that the plaintiffs were not possessed.

It was opened by *Crowder* for the plaintiff, that 405 chests of sealing-wax had been bought of the defendant by the plaintiffs through Messrs. Lord & Co., who were brokers.

On the part of the plaintiff, Mr. Stovell, the partner of Mr. Lord the broker, was called. He proved the handwriting of the signature of Mr. Henry Gibson Lord (who was a son and clerk of Mr. Lord the broker) to the bought and sold notes of the sealing-wax in question, which were put in. They were as follow:—

"London, 22d March, 1842.

"Bought by order of Messrs. W. Townend & Co., the following goods. East India Company's conditions, prompt 25th of June, brokerage 1 per cent., deposit 15 per cent., payable 2d April.

Chests.

Per Helen Mary	146
Brightman	107
Crusader	152

405 chests of E. I. sealing-wax,
16s. per cwt. in bond.

"Your most obedient servants, H. W. LORD & Co.
"p. HENRY GIBSON LORD."

* "London, 22d March, 1842.

"Sold by order and for account of Mr. D. Drakeford, the following goods. East India Company's conditions, prompt 25 June, brokerage $\frac{1}{2}$ per cent. [*21

Chests.

Per Helen Mary	146
Brightman	107
Crusader	152

405 chests of E. I. sealing-wax,
16s. per cwt. in bond.

"Your most obedient servants, H. W. LORD & Co."

Follett, S. G., for the defendant.—I submit that there is no contract between these parties. These bought and sold notes do not tally. The bought note has “brokerage 1 per cent.,” “deposit 15 per cent.” The sold note is “brokerage $\frac{1}{2}$ per cent.,” and the deposit omitted entirely.

One of the special jury.—The buyer pays the broker one per cent. and the seller half per cent.

Crowder.—The contract is perfectly correct. The price is the same, and so is the prompt.

Lord DENMAN, C. J.—If the bought and sold notes do not agree, how can I hold it to be any contract?

Mr. Stovell recalled.—I produce the broker’s book in which is the entry of this sale. The entry is not signed, but it mentions the deposit. The broker generally holds the deposit to protect the seller. The broker is responsible for the fulfilment of the contract. The defendant looked to us to pay for the goods, as he did not know the other parties. The buyer *22] knew the seller as being the *importer of the goods. It is the broker’s business to get the deposit.

Crowder referred to the case of *Hawes v. Forster*, 1 M. & Rob. 368.(a)

Lord DENMAN, C. J.—After much consideration, and after consulting merchants, we held that the bought and sold notes were the contract, and not what is written by the broker in a book which nobody sees. If there is nothing but the book, we must go by that. In the present case I am of opinion that the discrepancy between these two notes makes it no contract.

Crowder.—I submit that this is no discrepancy. The deposit is as much for the benefit of the broker as of the principal, as it is for the broker’s security; and as to the brokerage, that is different for the buyer and the seller.

Lord DENMAN, C. J.—I would receive any evidence, (subject to objection,) that you have as to the usage of the trade with respect to the deposit.

Crowder.—If I could show an admission in writing of a contract by the defendant,—would not that be evidence?

Lord DENMAN, C. J.—If you had commenced with that, you would have had a *prima facie* case; but when these notes were put in, it would have been seen that there was no contract. If the bought and sold notes differ in any material particular, there is not contract.

*23] *Follett*, S. G.—There is also a point in this case that must *be decided at some time, which is, whether these notes are sufficient if signed by a clerk of the broker.

Lord DENMAN, C. J.—The plaintiffs must be nonsuited.

Nonsuit.

Crowder and *Cowling*, for the plaintiffs.

Follett, S. G., *E. Jurnes*, and *Willes*, for the defendant.

(a) That case was tried at the sittings after M. T. 1832, and a new trial was granted, the second trial being at the sittings after T. T. 1834. We believe that there is no report of the case in Banco.

COURT OF COMMON PLEAS.

Sitting in London in Easter Term, 1843.

BEFORE MR. JUSTICE MAULE.

WEBB v. PAGE.

A witness who is called in an action to depose to a matter of opinion, depending on his skill in a particular trade, has, before he is examined, a right to demand, from the party calling him, a compensation for his loss of time; and there is a distinction between a witness thus called, and a witness who is called to depose to facts which he saw.

CASE for negligence in carrying goods.

A witness was called for the plaintiff, to speak to the nature of the damage sustained by the goods, (which consisted of cabinet work,) and the expense that would be necessary to restore or replace the injured articles. Before being sworn, the witness applied for compensation for his loss of time.

MAULE, J.—There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his *knowledge—without such testimony, the course of justice must be stopped. The latter is under no such obligation. There is no such necessity for his evidence, and the party who selects him must pay him. [*24]

Mr. Wyche, the plaintiff's attorney, gave his undertaking to pay the witness, who was then examined.

Dowling, Serjt., and *Petersdorff*, for the plaintiff.

Bompas, Serjt., and *Kennedy*, for the defendant.

Sittings at Westminster after Trinity Term, 1843.

BEFORE LORD CHIEF JUSTICE TINDAL.

GREGORY v. DUKE OF BRUNSWICK AND VALLANCE.

The public, who go to a theatre, have a right to express their free and unbiassed opinions of the merits of the performers who appear upon the stage; but parties have no right to go to a theatre, by a preconcerted plan, to make such a noise that an actor, without any judgment being formed of his performance, should be driven from the stage; and if two persons are shown to have laid a preconcerted plan to deprive a person who comes out as an actor of the benefits which he expected to result from his appearance on the stage, they are liable in an action for a conspiracy. In an action for a conspiracy to hiss an actor, the defendants cannot, under the general issue, give in evidence libels published by the plaintiff, with a view of showing that the plaintiff was hissed on account of those libels, and not by reason of any conspiracy of the defendants.

In an action for a conspiracy, the defendants pleaded the general issue, and also a special plea of justification, which plea was demurred to, and held bad by the court, who gave judgment on it for the plaintiff, and the award of venire was as well to try the issue joined "as to inquire what damages the said plaintiff hath sustained on occasion of the premises whereof the court hath given judgment for the said plaintiff:"—*Held*, that on the trial at Nisi Prius, the defendant's counsel, in addressing the jury, had a right to refer to the allegations contained in the special plea, and to comment upon them.

CASE.—The declaration stated that, before and at the time of the conspiracy thereafter mentioned, the plaintiff was about to become an actor, and to use the profession or occupation of an actor for profit and advantage, and to perform the character of Hamlet in a certain tragedy at
 *25] Covent Garden Theatre for reward, to be therefor paid to the plaintiff by Alfred Bunn, the then manager of that theatre. Yet the defendants, with divers other persons, contriving, &c., on the 13th day of February, 1843, "falsely, wickedly, and maliciously did among themselves conspire, combine, confederate, and agree together to prevent the plaintiff from performing in public as such actor as aforesaid in the character of Hamlet in the performance of the said tragedy in the theatre aforesaid, and to prevent the public audience, which might be assembled to witness the performance of the said tragedy in the said theatre on the occasion when the plaintiff was to perform as aforesaid, from hearing or appreciating the performance of the said character by the plaintiff as aforesaid in the said tragedy, and to compel the plaintiff to desist from the performance of the said character, and to deter and prevent the manager of the said theatre from allowing or retaining the plaintiff to perform as such actor as aforesaid in the said theatre, and to prevent the plaintiff from exercising his said profession or occupation of an actor in the said theatre, and from gaining or acquiring any profit, fame, or reputation by his performance as an actor in the character aforesaid." It then went on to aver that the defendants and the other persons "in pursuance of, and according to, the said conspiracy, combination," &c., "and, in order to carry the same into fulfilment, hired and engaged divers, to wit, 200 persons, to attend as part of the audience in the said theatre on the occasion when the plaintiff was to perform as aforesaid, and did perform, to hoot, hiss, groan, and yell at and against the plaintiff during his performance," and to aid the defendants in carrying the conspiracy into effect; and that afterwards the plaintiff, at the request of the said Alfred Bunn, did appear in the character of Hamlet in the said theatre before a public audience, nevertheless the defendants, in further pursuance of the conspiracy, and to carry it into effect, did, with the other persons so engaged as aforesaid, hoot, hiss,
 *26] groan, and yell "at the plaintiff, and made an uproar against the plaintiff, so that the performance of the character of Hamlet by the plaintiff could not be heard, understood, or appreciated; and it was stated, as special damage, that Mr. Bunn would not retain the plaintiff as an actor in the said theatre for gain and reward to the plaintiff, as he otherwise would.

Pleas, *first*, not guilty; *second*, to the whole declaration, that the plaintiff was not about to use the profession or occupation of an actor for profit; *third*, as to the hissing, hooting, &c., and procuring others to do so, that the plaintiff did not use the profession or occupation of an actor for profit; *fourth*, as to so much of the said grievances as relates to the hooting, hissing, &c., at the plaintiff, and making an uproar against the plaintiff, that

for five years before the committing of the last-mentioned grievance, the plaintiff was the proprietor of the Satirist newspaper, 10,000 copies of which were sold on the Sunday in every week; and that the plaintiff had been, and was in the habit of writing and publishing, and causing to be written and published in the said newspaper, divers indecent and disgusting articles against good morals, and in violation of the laws, and divers false and malicious libels of and concerning her majesty, and of and concerning divers persons, and divers blasphemous and seditious libels; and that the plaintiff was a common libeller, and in the habit of receiving money from divers persons, for suppressing, and promising to suppress, defamatory matter, which such persons were induced to believe would appear in the said newspaper, unless they made such payments; and the plaintiff, during all the times aforesaid, notoriously gained his livelihood by the means and practices aforesaid, and that the plaintiff, being such person as aforesaid, appeared as a public actor at the said theatre, to the great scandal, nuisance, and outrage of the persons in the said theatre, and against public morals and decency, wherefore the defendants being present in the said theatre, as part of the audience, did then, in order to compel the plaintiff to [*27 desist and forbear from appearing on the said stage, as such actor and performer, and to prevent, as far as in them lay, the said scandal, nuisance, and outrage, a little hiss, groan, and yell at the plaintiff, as they lawfully might, (concluding with a verification.)—Replication to the first, second, and third pleas, a similitur, and to the fourth plea a demurrer, assigning, for causes, that this plea was only pleaded to a part of the declaration not divisible from the conspiracy; that the matters of the plea did not justify the conspiracy; that they did not warrant the noise, &c., so as to cause the damage mentioned in the declaration; that the audience of a theatre have no right to hiss, hoot, &c., an actor so as to injure him, merely because he may be chargeable with offences unconnected with the stage, or with his performances as an actor; and that the charges in the plea were too general, in not setting out the particular libels, and the names of the persons from whom the plaintiff received money for suppressing, or promising to suppress, defamatory matter, and the sums received, and the times when. To this demurrer there was a joinder, and judgment for the plaintiff on the demurrer, “that the said last plea of the said defendant is not sufficient in law.” The Nisi Prius record then went on as follows:—“Wherefore the said plaintiff ought to recover his damages upon occasion of the premises against the said defendants, but because it is unknown to the court what damages the said plaintiff has sustained on occasion thereof, and because it is convenient and necessary that there be but one taxation of damages in this cause, therefore let the inquisition of damages in this behalf be stayed until the trial of the said issues above joined, between the said parties, to be tried by the country, thereupon as well to try the said issues, above joined between the said plaintiff and the said defendants, as to inquire what damages the said plaintiff hath sustained on occasion of the premises, whereof the court hath given judgment for the said plaintiff, the sheriff is commanded that he cause to come here forthwith, twelve, &c., by whom, &c., and who neither, &c., to recognise, &c., [*28 because as well, &c.”

In his opening, *Shee*, Serjt., for the plaintiff, referred to the case of *Rez v. Leigh and others*, which occurred in the year 1775, which was an indictment for raising a disturbance at Covent Garden Theatre for the purpose of procuring the discharge of Mr. Macklin, and cited the case of *Clifford v.*

*29] *Brandon*, 2 Camp. 358, (a) in which Sir James MANSFIELD,* C. J., says, "But if any body of men were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment." He also argued that, however the public might have a right either by hissing or otherwise to express their opinions of an actor, with respect to his merits or demerits as an actor, the public could have no right to hiss any actor on account of any dislike that might be entertained of his private character or conduct apart from his performance on the stage.

It was proved that on the 13th of February, 1843, the plaintiff appeared on the stage of Covent Garden Theatre for the purpose of playing the character of Hamlet, and that there was a great disturbance, and so much hissing, yelling, and noise, that the plaintiff was obliged to desist from performing the character. It was proved that both the defendants were in the theatre and took an active part in the disturbance.

It was proposed by *Humfrey*, for the defendant, to put a copy of the *Satirist* newspaper into the hand of Mr. Stevens, a witness for the plaintiff, and to ask him if he had read it.

Shee, Serjt., for the plaintiff.—I submit that the *Satirist* newspaper and its contents are not evidence in this action.

*30] *Talfourd*, Serjt., for the defendants.—I apprehend that this paper is receivable in evidence, as the question is, whether there was a preconcerted contrivance of the defendants on this occasion, or whe-

(a) In a note to this case, Mr. (now Lord) Campbell says, "Macklin, the famous comedian, indicted several persons for a conspiracy to ruin him in his profession. They were tried before Lord Mansfield, and it being proved that they had entered into a plan to hiss him as often as he appeared on the stage, they were found guilty, under his lordship's direction; but the prosecutor declined calling upon them to receive the judgment of the court. I have not been able to find any authentic account of the trial." This evidently refers to the case of *Rez v. Leigh and others*, of which, we believe, as above stated, there is no report in any law book. The best contemporary account of it will be found in the *Morning Chronicle*, of February 25, 1775, (in the Library of the British Museum,) and in the *London Chronicle* of the same date, in the Library of the City of London; a short account of the trial is also in *Dods. Ann. Reg.* for 1775, p. 95. From all these, it appears that the trial was on a criminal information, and before Mr. Justice Aston, at Westminster, on the 25th of February, 1775. A copy of the information will be found in 6 *Wentw. Pl.* 443; *Cr. Cir. Ass.* 244; *Hands. Crown Off. Pr.* 132; and 2 *Chitty Cr. L.* 494; and it is worthy of remark, that, although in nearly all the books in which this case, or this criminal information, is mentioned, it is treated as a case of conspiracy; yet there is no count in the information in which a conspiracy is charged as the corpus delicti, as the first count (which is the only one in which any thing at all touching on conspiracy occurs) merely charges, that the defendants, "conspiring together to ruin the said Charles Macklin," on, &c., at, &c., "unlawfully, wickedly, riotously, and tumultuously, at and in the said theatre, made and raised a great noise, tumult, riot, and disturbance, and thereby tumultuously and turbulently prevented and hindered the said C. M. from playing and performing the part or character of *Shylock*." All the other counts appear to be counts for riots; but it may be doubted whether either of them is a good count for a riot, as they none of them conclude in *terrorem populi*, which, in the case of *Rez v. Hughes*, 4 C. and P. 373, was held to be essential. It is also worthy of remark, that, in the *Cr. Cir. Ass.* 244; *Hands. Cr. Off. Pr.* 122; and 2 *Chitty Cr. L.* 494, it is stated, that the defendants were convicted *and fined*. The latter part of the statement, as to the fine, seems erroneous, as it not only appears from *Dodsley's Ann. Reg.* for 1775, p. 117, and from the *London Chronicle* of May 11, 1775, that no sentence was passed on the defendants, they consenting to pay Mr. Macklin his law expenses, and to take 100*l.* worth of tickets for his benefit, and 100*l.* worth of tickets for his daughter's benefit; but we were informed by the late Mr. Dealtry, (who was Master of the Crown Office,) that no entry of any judgment in this case was to be found in the *Crown Office*, and that he was therefore certain that no sentence had ever been passed.

ther the uproar arose from the disgust of the audience at the appearance on the public stage of a person who, for many years, had indulged in a system of private libelling.

Humfrey, on the same side.—We propose to show that the libels contained in the different numbers of the *Satirist* are of such a nature that no man who had written or published them could hope for a single moment to appear on the English stage, and that that which is here charged as being the effect of a conspiracy between the two defendants was, in reality, the unanimous feeling of the audience, arising from their knowledge of these infamous publications.

TINDAL, C. J.—I cannot see how this evidence can be admissible without a plea of justification. I will receive evidence to show that the expression of feeling did not arise from any previous act or combination of the defendants, but I cannot allow evidence to be given in of an indictable offence when the party has no previous intimation given him on the subject.

The evidence was rejected.

Talfourd, Serjt., addressed the jury for the defendants, and referred to the allegations in the fourth plea, and argued that those allegations must, for the purposes of this case, be taken as facts admitted by the plaintiff by reason of his having demurred to that plea.

Shee, Serjt.—I submit that as no issue is taken in that plea, it ought not to be referred to.

TINDAL, C. J.—I cannot prevent my brother *Talfourd* *from referring to the fourth plea, because that plea is not only set forth in the *Nisi Prius* record, but the present jury are to try the issues found on that record, and also “to inquire what damages the plaintiff hath sustained on occasion of the premises whereof the court hath given judgment for the said plaintiff,” which is on this very plea. [*31]

Talfourd, Serjt., further addressed the jury, and contended that the reason why the plaintiff was hissed was, not from any conspiracy of the defendants, but because the feeling of the whole audience was against him on account of the libellous character of the articles in the *Satirist* newspaper.

TINDAL, C. J., (in summing up.)—This action is brought against the defendants for having conspired together in order to prevent the appearance of the plaintiff as an actor at Covent Garden Theatre; and in the declaration, two overt acts are stated, the first, that the defendants hired a number of other persons to engage in the same design, and, by their hissing and hooting, produced the effect intended by themselves in the conspiracy—the second, that the defendants joined in the hooting themselves. You will say whether upon the evidence you are satisfied that the defendants are guilty of the conspiracy charged, and, if you are, what amount of damages the plaintiff has sustained. The law on this subject lies in a narrow compass. There is no doubt that the public who go to a theatre have the right to express their free and unbiassed opinions of the merits of the performers who appear upon the stage, and I believe that no persons are more anxious that the public should have that right than the actors themselves, for if it were laid down that persons who exercised their free judgments would be subject to actions for damages, not only would it be fatal to the actors on the stage, but it would prevent persons from frequenting the theatre at all. At the same time parties have no right to go to the theatre *by a preconcerted plan to make such a noise that an actor, without any judgment being formed on his performance, should be driven from the [*32]

stage by such a scheme, probably concocted for an unworthy purpose; and therefore it is only, if you can see by the evidence that has been given, that the two defendants had laid a preconcerted plan to deprive Mr. Gregory of the benefits which he expected to result from his appearance on the stage, that you ought to find a verdict against them. A distinction has been taken as to the right of the public to express their feelings as to an actor's private character when on the stage. It is not necessary that I should give any opinion on that point, as the question here is, whether these parties went to the theatre according to a scheme that had been laid to prevent an actor from appearing. I, therefore, reserve to myself the free exercise of my opinion on the other point, and I will state it whenever it shall become necessary.

Verdict for the defendants.

Shee, and *Byles*, Serjts., and *Montagu Chambers*, for the plaintiff.

Talfourd, Serjt., *Humfrey* and *Wordsworth*, for the defendants.

In the ensuing term, *Shee*, Serjt., applied for a new trial, on the ground of misdirection, inasmuch as the lord chief justice, in his summing up, had not directed the jury that they might find a verdict against one defendant only, and also on the ground that the verdict was a verdict against evidence. He also applied for a venire de novo, on the ground that the jury had not assessed damages on that part of the record to which the demurrer applied.

*33] The Court, after taking time to consider, refused the rule as to the alleged misdirection, and as to the venire de novo; but granted a rule to show cause, on the ground only of the verdict being against evidence, which was, after argument, discharged.

Sitting in London in Michaelmas Term, 1843.

BEFORE MR. JUSTICE CRESSWELL.

BEDFORD v. FORBES and Others.

An outstanding docketed judgment not registered pursuant to the provisions of the stats. 1 & 2 Vict. c. 110, s. 19, and 2 & 3 Vict. c. 11, ss. 2 and 3, is not a valid objection to the title of a vendor on the sale of realty.

ISSUE directed by the Court of Common Pleas, under the stat. 1 & 2 Will. 4, c. 58, s. 1, to try the right of a vendor to recover back a deposit on the purchase of certain real property sold by auction.

It appeared that the plaintiff had attended the auction at which the estate in question was sold, and it having been knocked down to him, he paid the deposit into the hands of the auctioneer, and signed the usual contract; and that after that, an abstract of the title having been sent to him, several objections were made to the title, one of which was, that there was an outstanding docketed judgment for £1500 against the vendor; but this judgment had not been registered in pursuance of the provisions of the stats. 1 & 2 Vict. c. 110, sect. 19, and 2 & 3 Vict. c. 11, ss. 2 and 3. It did not appear what the precise date of the judgment was, but it was assumed by the vendee, and not denied by the vendor, that the date was before the stat. 1 & 2 Vict. c. 110 came into operation. On this ground, (with others,) the vendee claimed to rescind the contract, and demanded

a return of the deposit from the auctioneer, which being refused, the vendee brought an action against the auctioneer for money had and received, and he having applied to the court under the stat. 1 & 2 [*34 Will. 4, c. 58, the present issue was directed to be tried, in order to determine whether the vendee was entitled to rescind the contract, and receive back his deposit.(a)

CRESSWELL, J. (in summing up).—I am of opinion that the outstanding judgment in question was not a valid objection to the title, as it had not been registered in pursuance of the provisions of the statutes which have been cited.

There was another objection to the title, which turned entirely on matters of fact, which were left by his lordship to the jury.

Verdict for the plaintiff.

Shee, Serjt., and *E. James*, for the plaintiff.

Dowling, Serjt., and *Bramwell*, for the defendant.

(a) By the stat. 1 & 2 Vict. c. 110, s. 13, it is enacted, that "a judgment already entered up or to be hereafter entered up against any person in any of her majesty's superior courts at Westminster, shall operate as a charge upon all lands," &c.; but, by sect. 19 of the same statute, it is provided, that no such judgment shall, by virtue of that act, affect any lands, &c., until it be registered in the manner therein mentioned; and by the stat. 1 & 2 Vict. c. 11, s. 2, it is enacted, "that no judgment already docketed and entered" under the stat. 4 & 5 Will. & M. c. 20, shall, upon the 1st of August, 1841, affect any lands, &c., until it is registered in the manner prescribed by the stat. 1 & 2 Vict. c. 110; and by sect. 3 & 4 of the stat. 2 & 3 Vict. c. 11, the date of the registering is to be inserted in the book kept for that purpose and all judgments must be re-registered every five years.

*COURT OF EXCHEQUER.

[*35]

First Sitting in London in Hilary Term. 1843.

WAITHMAN v. ELSEE.

A paper, signed by the defendant, was in the following form:—"I O. U. £85, to be paid May 5:"—*Held*, that this was a promissory note, and required a stamp.

ASSUMPSIT for money lent, with a count upon an account stated. Plea, non assumpsit.

The cause was undefended, and *Bramwell*, for the plaintiff, offered in evidence an I. O. U., signed by the defendant, but not addressed to any one, which was in the following form:—

"I O. U. £85, to be paid May 5.

"WM. ELSEE."

It was not stamped.

ROLFE, B.—This is a promissory note. I cannot allow it to be read in evidence, as it is unstamped.(a)

(a) Baron Bayley lays down, (Bay. on Bills, c. 1, s. 2.) "No particular words are necessary to make a bill or note, but it must be a written order or promise, which, from the time of making it, cannot be complied with or performed without payment of money. Thus, an order or promise to deliver, or that L. S. shall receive money, or to be accountable or responsible for it to him or order, is a good bill or note; but a mere acknowledgment of a debt, without any promise to pay, is not a bill or note." See, also, the case of *Evans v. Phillips*, 9 C. & P. 270.

The I. O. U. was not given in evidence, and other evidence was given.

Verdict for the plaintiff.

Bramoell, for the plaintiff.

*36] **Second Sittings in London in Trinity Term, 1843.*

BEFORE BARON PARKE.

WATSON v. HETHERINGTON.

Mr. A., the plaintiff's attorney, wrote to the defendant, stating that a debt due from the defendant to the plaintiff "must be paid to me" on the next day.—A tender was made on the next day to a writing clerk of Mr. A., in Mr. A.'s office, who said that he could not take the money, as Mr. A. was out, and the person must wait till he came:—*Held*, not a good tender, as not being made to a person authorized to receive money; but that, if Mr. A.'s letter had asked payment "at my office," a tender to any person in the office who was carrying on the business there would have been sufficient.

ASSUMPSIT for goods sold, work and labour, and on an account stated.—Pleas, 1st, as to all, except 16*l.* 7*s.* 2*d.*, non assumpsit, and as to that sum a tender; 2dly, to the whole declaration, payment.—Replication, denying the tender and the payment.

With respect to the tender, it appeared that Mr. Ashley, the plaintiff's attorney, had written a letter to the defendant as follows:—

"9, *Shoreditch*, 4th August, 1842.

"Sir,—I am desired by Mr. Harris Watson to apply to you for payment of 37*l.* 7*s.* 6*d.*, and beg to say, that the same must be paid to me in the course of to-morrow.

"I am, Sir, yours obediently,

"HY. ASHLEY."

It was proved, that, on the 5th of August, Mr. Green, a clerk of the defendant's attorney, went to the office of Mr. Ashley to make a tender of 16*l.* 17*s.* 2*d.*, and that he offered the money to a writing clerk in the office of Mr. Ashley, who would not receive it, and who said that he could not do so, as Mr. Ashley was out, and that Mr. Green must wait till he came in.

PARKE, B.—This is not a good tender. The cases go to show, that where an attorney asks payment at his office, a tender to any person who
*37] is in the office carrying on the *business will do; (a) but here the attorney writes asking payment to himself, and the tender is made to a writing clerk, who says he cannot take the money because Mr. Ashley is out, and the person must wait till he came. A writing clerk in

(a) In the case of *Kirton v. Brathwaite*, 1 M. & W. 310, the plaintiff's attorney, before action brought, wrote to the defendant, saying, that, unless the debt, together with his (the attorney's) charge for that letter, were paid "at my office" on the following Wednesday at 12 o'clock, proceedings would be commenced. On the Wednesday, at 10 o'clock, an agent of the defendant went to the attorney's office, and there saw a boy, to whom he tendered the amount of the debt only. The boy, after referring to the letter-book, refused to accept it unless the charge for the letter were also paid. It appeared that the writ was issued at 11 o'clock on that day:—*Held*, (Baron Parke, dubitante,) that this was a good tender; and Baron Bolland said, "There is no doubt the letter would authorize anybody in the office to receive the money."—See also the case of *Wilmot v. Smith*, 3 C. & P. 453.

an attorney's office is not a person generally authorized to receive money. This tender was not made to a person who had authority to receive money, and who was authorized to give a discharge for money, the attorney having written asking payment to himself.

Verdict for the plaintiff on all the issues, damages 37*l.* 7*s.* 6*d.*

Jervis, E. James, and Hubert Lucas, for the plaintiff.

Crowder and Davison, for the defendant.

*MILLER v. KER.

[38*

Where the property of a deceased debtor has been sequestrated under the Scotch Bankrupt Act, 2 & 3 Vict. c. 41, the title of the trustee under the sequestration is made out by proof of the "act and warrant," in the manner prescribed by the 48th section of that statute, whether the property of the deceased debtor was subject to Scotch bankrupt laws or not; and, semble, that, in an action by such trustee, the defendant cannot, after such proof, impeach the trustee's title, the only mode of doing so being by application in the Scotch courts.

The property of a deceased debtor, who, at the time of his death resided or had a dwelling-house, or carried on business in Scotland, and was at that time owner of heritable or movable estates in Scotland, is liable to the Scotch Bankrupt Act, 2 & 3 Vict. c. 41; and it is not necessary that the deceased debtor should have been a trader, and the amount of his heritable or movable estate in Scotland at the time of his death is immaterial.

Issue directed by the Court of Exchequer to try whether the plaintiff was entitled to the possession of certain assignations of debts to John James Fraser, deceased.

It was opened by *J. Henderson*, for the plaintiff, that the plaintiff was the trustee of the sequestrated estate of Mr. Fraser, under the Scotch Bankrupt Act, 2 & 3 Vict. c. 41, the documents in question having belonged to Mr. Fraser at the time of his death, which took place in London on the 3d of June, 1839. Mr. Fraser was a writer to the signet, who had an office in Albany Street, Edinburgh, and, by means of a clerk, carried on business there, down to the time of his death, and had desks and books there, he himself being in bad circumstances, and in London, to avoid his creditors. By the 4th section of the Scotch Bankrupt Act, 2 & 3 Vict. c. 41, Mr. Fraser's property would be liable to the Scotch Bankrupt Laws if he was a deceased debtor, (although not a trader,) who, at the time of his death, carried on business in Scotland, and was at that time owner of heritable or movable estates in Scotland; but he submitted, as matter of law, that, upon proof, on the part of the plaintiff, of a copy of the act and warrant in favour of the plaintiff as trustee, verified and authenticated in the manner prescribed by the 48th section of the act, the plaintiff would be entitled to recover in this action, and that, after such proof, it would not be competent to the defendant to dispute the plaintiff's title as trustee. He cited the case of *Viscount Melville v. Paterson*. (a)

(a) 4 Bell & Murray, (Decis. of the Court of Session, New Ser.) 1311. In that case it appeared that John Plummer, who was possessed of heritable property near Dalkeith, died in 1841, and that his estates were thereafter sequestrated, in terms of the bankrupt statute. "Plummer, at his death, was feudally vested in the property. The heritable property, having been exposed to public roup by the trustee, was purchased by the complainer, Lord Melville, at the price of £3215, the trustee being bound by the articles of roup to grant the purchaser a formal disposition of the lands, the trustee proposing to convey the property to Lord Melville, as having been invested in himself *vi statuti*. His Lordship objected, that the title offered by the trustee was defective, inasmuch as

*39] *A copy of the act and warrant, in favour of the plaintiff, as trustee, certified by one of the Bill Chamber clerks, and authenticated by the seal of the Court of Session, was put in ; and it was proved by Mr. Gowan, an advocate at the Scotch bar of twelve years' standing, that, in all the courts in Scotland, this verified and authenticated copy of the act and warrant would be conclusive evidence of the plaintiff's title as trustee, and would be conclusive evidence for and against all parties in all suits ; and it was proved by a person who had been a clerk of Mr. Fraser, that Mr. Fraser had gone to London about a year before his death, but that he had an office in Albany Street, Edinburgh, in which there were books and desks, at which, by means of his clerk, he transacted business for clients, down to the time of his death.

The whole of the proceedings in the sequestration of Mr. Fraser's estate were put in, some of them being the originals, and the rest examined copies.

*40] PARKE, B. (in summing up).—I am of opinion that, *under the 40th section of the act, the plaintiff has made out his title by proof of the act and warrant, and that the latter words of the section are only cumulative ; and that, upon the proof of the act and warrant, the plaintiff is entitled to recover in this action, whether Mr. Fraser was liable to the Scotch Bankrupt Act or not. It is not at all required by the act that he should have been a trader, as, under the 4th section, it applies to the estates of any deceased debtor, who, at the time of his death, resided, or had a dwelling-house, or carried on business, in Scotland, and was at the time owner of heritable or movable estates in Scotland. I shall, therefore, superfluously leave it to you to say whether you are satisfied, first, that Mr. Fraser is dead ; and, secondly, whether, at the time of his death, he carried on business in Scotland, and had heritable or movable estate in Scotland. According to the evidence of his clerk, Mr. Fraser, at the time of his death, had an office in Albany Street, and up to the time of his death carried on business for clients ; and it is also proved that, up to that time, there were books and desks in his office, which would be movable estate within the provisions of the statute, as the quantity of movable estate is immaterial. I have left these questions to you, but I think it is pretty clear that no question can be raised in this case against the title of the trustee, and that, if his title were to be disputed, the proper course would be, to apply to the Courts in Scotland.

Verdict for the plaintiff.

J. Henderson and Anderson, for the plaintiff.

W. H. Cooke, for the defendant.

sections 79 and 87 of the Bankrupt Act, and other sections, referred to sequestrations of estates of bankrupts which had been sequestrated in their lifetime, and not to sequestrated estates of deceased debtors ; and, on this ground, a note of suspension as of a threatened charge for the price was presented by Lord Melville. The Lord Ordinary refused the note, but, in the circumstances, found no expenses due to either party. Lord Melville reclaimed. But the Court, on a view of the 79th and 87th sections by themselves, and still more, taking them in connection with the whole statute, had no hesitation in holding that they applied to the sequestrated estates of deceased as well as living bankrupts, and that Lord Melville's title from the trustee would be a perfectly good one ; and their lordships accordingly adhered, finding additional expenses due."

*STOCKMAN v. PARR.

[*41]

To prove notice of dishonour of a *bill of exchange* for £53, dated December 19, 1842, evidence was given that a letter was sent to the defendant asking payment of 53*l. 6s. 6d.*, "due on your dishonoured *note* dated 19th December last," [1842:]—*Held*, to be a sufficient notice of dishonour, although the instrument dishonoured was a *bill*, and not a *note*, and was for £53, and not 53*l. 6s. 6d.*, unless it appeared that there was some other instrument to which the notice could apply, and that the proof of the existence of such other instrument lay on the defendant.

ASSUMPSIT by the plaintiff as endorsee, against the defendant as drawer, of a bill of exchange for £53, dated the 19th of December, 1842, drawn by the defendant on P. A. Carter, payable three months after date. Plea, that the defendant "had not due notice of the non-payment of the bill of exchange in the declaration mentioned, in manner and form," &c., (concluding to the country.)

The bill of exchange was as stated in the declaration, and it was admitted, that, if the notice of dishonour was sufficient in point of form, it was given at the proper time, as the bill, at the time it became due, was in the hands of Messrs. Jones, Loyd & Co., the bankers.

The notice of dishonour was as follows:—

"*Bath, 24th March, 1843.*

"Sir,—We are instructed by Mr. Henry Stockman, of this city, to apply to you for payment of the under-mentioned sum, and to acquaint you, that, unless the same, together with 5*s.*, the costs of this application, be paid at our office, on or before Monday next, 12 o'clock, legal proceedings will be commenced against you, to enforce payment thereof, without further application.

"We are your obedient servants,

"BATCHELLOR, HARFORD, and STAUNTON."

£	s.	d.	
53	6	6	Due on your dishonoured <i>Note</i> , dated 19th December last.
0	5	0	Cost of letter.
<hr/>			
53	11	6	
<hr/>			

"Mr. Thomas Parr, Wroughton, near Swindon, Wilts."

**Pickering*, for the defendant.—I submit that this notice is insufficient. The amount of this bill of exchange is £53, and not 53*l. 6s. 6d.*, as stated in the notice; and, further, it is a bill of exchange, and not a note. [*42]

Hance, for the plaintiff.—The notice does not state that the bill is for 53*l. 6s. 6d.*, but that 53*l. 6s. 6d.* is due upon it; and, from the notary's ticket annexed to the bill, it appears that the sum of 6*s. 6d.* is for notarial charges.

PARKE, B. (to the plaintiff's counsel).—Have you any evidence to show that there was no other instrument to which this notice can apply?

Hance.—I submit that the proof of the existence of another instrument, to which the notice could apply lies on the defendant. In the case of *Shelton v. Brathwaite*, 7 M. & W. 436,(a) it was held, that, where there

(a) In that case, a bill of exchange having been drawn upon A. B., was accepted by him, and was afterwards endorsed by the drawer to the plaintiffs, who endorsed it to the Birmingham and Midland Counties Bank, who endorsed it to a person named Williams.

was more than one bill to which notice of dishonour might apply, it lay on the defendant to show that.

PARKE, B.—I shall act upon that case, and hold that it lies upon the *43] defendant to produce evidence that there is some *other instrument to which the notice may apply. The date is stated correctly, and I must presume, from the statement of the date, that this notice refers to the bill in question.

Pickering.—This is a bill of exchange, of which the term “note” is not a sufficient description. In the case of *Stratton v. Brathwaite*, the word used in the notice was “draft,” which may import either a bill of exchange or a note.

PARKE, B.—I think, in the absence of proof of any other instrument to which notice could apply, this letter contained all that is required by law, and I shall direct the jury accordingly.

His Lordship directed a verdict for the plaintiff.

Hance, for the plaintiff.

Pickering and *Hugh Hill*, for the defendant.

On a subsequent day, *Hugh Hill* applied for a new trial, but the court refused a rule.

*44] *Sittings in London after Trinity Term, 1843.*

BEFORE LORD ABINGER, C. B.

THURNELL v. SYMONDS.

A. entered into a written agreement with B. to let him a house for a year, and therein stipulated that if B. expended money in repairing the house, and A. did not at the end of the year grant to or procure for B. a lease of the house for seven years, A. would repay to B. half the amount of the repairs, not exceeding £40, within the year. B. expended money in repairs, and had paid the workmen, and A. neither granted nor procured the lease:—*Held*, that B. could not, on a common count for money paid, recover the half of the amount of the repairs under the agreement, but that the declaration must be special.

ASSUMPSIT.—The declaration contained common counts for goods sold and delivered, money paid, and on an account stated. Pleas—as to the goods sold and delivered, a tender; and as to the residue, non assumpsit.

It appeared that, in the month of September, 1840, the plaintiff and defendant entered into a written agreement, (which was given in evidence,) by which it was agreed that the defendant should let and the plaintiff take the house and premises, No. 4 Aldgate, for a year, from the 29th of September, 1841, to the 29th of September, 1842; and that, if the plaintiff should, during that year, expend any money “in repairing and beautifying” the premises, and the defendant should not, at the expiration of that time, give to, or procure for, the plaintiff a lease of the premises for

The bill having been dishonoured when due, Mr. Williams gave notice of it to the bank, who gave notice to the plaintiffs, one of whom wrote the following letter to the drawer:—“To my surprise, I have received an intimation from the Birmingham and Midland Counties Bank, that your draft on A. B. is dishonoured, and I have requested them to proceed on the same.” *Held*, that, if there was more than one bill to which the letter could apply, it lay on the defendant to prove that fact, in order to show its uncertainty:—*Held*, also, that the letter was a good notice of dishonour.

seven years from that time, to be prepared by the defendant's solicitor at the expense of the plaintiff, the defendant would repay to the plaintiff a moiety of the sum expended by him in repairing and beautifying the premises not exceeding £40. It was proved that, between the 29th of September, 1841, and the 29th of September, 1842, the plaintiff had expended money in repairing the premises, and that he had paid the workmen before the bringing of the present action, and that no lease had been granted by the defendant, or procured by him for the plaintiff.

Whateley and Willes, for the defendant, objected that the present action was wrongly conceived, and that it ought to have been in special assumpsit on the agreement. (a)

**Hoggins*, for the plaintiff.—I submit that, as nothing remains to be done on the agreement, except the mere payment of the money, [45 a common count is sufficient.

Lord ABINGER, C. B.—It is clear that the plaintiff cannot recover on the common count for money paid, as the money was never money paid to the defendant's use. The plaintiff must be called.

Hoggins, for the plaintiff.

Nonsuit.

Whateley and Willes, for the defendant.

(a) In the case of *Spencer v. Parry*, 4 N. & M. 770, where, by a local act of parliament, the landlord or receiver of rents, and not the tenant, is rendered liable to pay the poor's rates, and by a written agreement, a tenant agreed with his landlord to pay the rent clear of all rates and taxes; and after occupying for some time, the tenant quitted, leaving the poor's rates and land-tax unpaid; the receiver of the rents was compelled to pay the rates, and the succeeding tenant the land-tax, which rates and land-tax were repaid to them by the landlord. It was held, that the landlord's remedy against the outgoing tenant was on the special agreement, and that he could not recover these sums from him as money paid to the tenant's use; and the declaration containing only the common counts for money paid, money had and received, and on an account stated, the plaintiff was nonsuited, and the nonsuit was afterwards held right by the Court of King's Bench. And in the case of *Lubbock, Bart., and Others v. Edward Tribe*, 3 M. & W. 607, where *Lubbock & Co.*, being bankers of the Kellewerris Mining Company, received, on account of that company, a check from the defendant, drawn by him on the Bank of England, which check being lost by L. & Co., the defendant, at the request of L. & Co., wrote to the Bank of England, requesting them not to pay the check if presented, and the defendant being afterwards requested by L. & Co. to give them another check for the amount upon receiving an indemnity for all loss which he might sustain by so doing, which the defendant promised to do, and the indemnity was accordingly sent, but the defendant wrote to L. & Co. to say that he could not conveniently send the check, but he would take the earliest opportunity of handing them the amount. L. & Co. were called upon and obliged to pay the amount of the lost check to the Kellewerris Mining Company; and it was held, that, under these circumstances, an action by L. & Co. against the defendant for money paid or on an account stated would not lie, and that the declaration should have been a special one on the agreement.

**ROWLAND and Another v. BERNES and Another*. [46

In an action for selling oil for the hair in bottles and with envelopes resembling those of the plaintiffs, the defendants pleaded that the oil sold by the plaintiffs was prepared from oil of an inferior quality, and was useless and valueless, and that the plaintiffs knew it, and that the oil sold by the plaintiffs was by reason thereof a fraud on all persons buying the same. The plaintiffs replied *de injuriâ*:—*Held*, that, on these pleadings, the defendant was entitled to begin.

CASE.—The declaration stated that the plaintiffs did prepare and sell certain oil, called Rowland's Macassar Oil, in bottles of a particular make, having the words "Rowland's Macassar Oil for the hair, Hatton Garden,

London," on them, which bottles were wrapped in envelopes having certain engravings on them: that the defendants wrongfully made a large quantity of oil to imitate and resemble the plaintiffs' oil, and sold it in bottles, resembling those of the plaintiffs, with the words and letters "Rowland's Macassar Oil for the hair, Hatton G^d, London," on them, the bottles being wrapped in envelopes having similar engravings to those of the plaintiffs.—Plea, that the oil prepared by the defendants was made from oil, to wit, oil of almonds, of a good and superior quality, and desirable for the purposes for which it was intended to be applied, and that the oil which the plaintiffs had been accustomed to sell and did sell in such bottles and in such envelopes and with engravings as aforesaid, was prepared from oil of bad and inferior quality, and utterly useless and worthless, the plaintiffs well knowing the same to be so, and that the oil which the plaintiffs had been accustomed to sell, and did sell in manner and form aforesaid, was not such as the plaintiffs stated and represented the same to be in manner and form aforesaid; but, on the contrary, the said oil which the plaintiffs had been accustomed to sell and did sell in manner and form aforesaid, and the sale thereof by them as aforesaid, was, by reason of the premises aforesaid, a gross fraud and imposition upon all persons buying the same, and which the said plaintiffs at the respective times of selling the same as aforesaid well knew, (concluding with a verification.) Replication, "that the defendants of their own wrong, and without the cause and matter of excuse *47] *by them alleged in their said plea, committed the grievances in the declaration mentioned in manner and form," &c., (concluding to the country.)

Talfourd, Serjt., for the defendants, claimed the right to begin, as the proof of the whole of the allegations of the plea lay on the defendant.(a)

Thesiger, for the plaintiff. I submit that, as the plaintiff sues for substantial damages, he ought to begin.

Lord ABINGER, C. B.—I think that the defendant is entitled to begin.

Talfourd, Serjt., for the defendant, opened the defendants' case, and had called two witnesses, when

Lord ABINGER, C. B., suggested that the case should be compromised.

A juror was withdrawn.

Thesiger and *Hayes*, for the plaintiffs.

Talfourd, Serjt., and *Humfrey*, for the defendants.

(a) See the case of *Stanton v. Paton* and wife, *post*. The rule as to the onus probandi appears to have been established as early as the reign of Charles the First, as Lord Keeper Littleton, in his reports in C. P., Trin. term, 3 Car. 1, (p. 36,) says, "In evidence al jury fuit dit per curiam que il que affirm le matter in issue doet primerment faire le proof al jury."

48*] *First Sitting in London in Michaelmas Term, 1843.

BEFORE BARON ALDERSON.

SMITH v. SLEAP.

A defendant had written a letter to Mr. H., the plaintiff's attorney, who stated in evidence that he had written a letter in answer to it, which he gave to the defendant at his (Mr. H.'s) office on the 4th of April. This letter of the 4th of April being called for under notice to produce, the defendant's counsel stated that there was no such letter, and

proposed to show by evidence that Mr. H. had not given his letter to the defendant on the 4th of April, at his office, as stated, because the defendant was at another place, and also because Mr. H.'s letter was dated on the 6th of April, and was sent by post on that day. The Judge received the evidence thus proposed to be given for the defendant before allowing the plaintiff to go into secondary evidence of Mr. H.'s letter of the 4th of April; but held, that such evidence was not evidence to the jury, but to himself only, and that any part of it which was written evidence should not be read by the officer of the court, but should be handed to the judge and then shown to the opposite counsel.

ASSUMPSIT for money had and received, with a count upon an account stated. Plea, non assumpsit.

On the part of the plaintiff, a letter written by the defendant to Mr. Hudson, the plaintiff's attorney, dated April 4th, 1843, was put in and read; and Mr. Hudson, who was called as a witness for the plaintiff, stated, that he, on the same day, wrote a letter in answer to it, which he gave to Mr. Sleep himself, at his (Mr. Hudson's) office in London, on the 4th of April, at about noon. Notice had been given to produce this letter of Mr. Hudson to the defendant, and on its production being called for,

Jervis, for the defendant, stated that the defendant had no such letter.

Crowder, for the plaintiff, proposed to give secondary evidence of the contract.

Jervis, for the defendant.—I propose to show, by evidence, that Mr. Hudson did not deliver this letter to Mr. Sleep on the 4th of April; and that, in fact, Mr. Hudson did not answer Mr. Sleep's letter till the 6th of April, and that he sent his answer by post; and I propose to give that evidence so as to exclude the parol evidence of the *supposed answer [49 of the 4th; because, if I do not give my evidence now, I shall not be able to exclude the secondary evidence proposed to be given on the other side. This course was adopted in a case before Baron *Parke*. (a)

ALDERSON, B.—I will now hear any evidence you have to show that Mr. Hudson did not deliver his letter to Mr. Sleep on the 4th of April, as he has stated; and I must decide on that evidence without the jury, as I have myself to decide all questions whether secondary evidence is admissible or not.

Jervis, for the defendant, put in a letter of Mr. Hudson to the defendant, dated the 6th of April, and sent through the post-office on that day.

Mr. Morris, the associate, began to read this letter, which commenced, "In answer to your letter of the 4th instant."

Crowder.—This letter should not be read in the hearing of the jury.

ALDERSON, B.—As I alone have to decide upon it, I think it should be handed to me, and then shown to Mr. *Crowder*.

This was done, and *Jervis*, for the defendant, called two witnesses, with a view of showing that the defendant was at the magistrates' meeting, at Brentford, on the 4th of April; but they stated, that the meeting began at noon, *and they were uncertain as to the precise time at which they [50 saw the defendant.

Mr. Hudson, in answer to a question put by the learned Baron, stated that he wrote two answers to the defendant's letter of the 4th of April, one of which he gave into the defendant's own hand on the 4th, and the other he sent by post on the 6th.

(a) As to the law and practice in criminal cases respecting the reception in evidence of declarations in articulo mortis, and confessions, see the cases of *Rex v. Hurks*, 1 Stark. N. P. C. 521; *Rex v. Swatkins*, 4 C. & P. 548: and *Rex v. Spilsbury*, 7 C. & P. 187.

ALDERSON, B. I shall receive secondary evidence of the contents of Mr. Hudson's letter of the 4th of April.

Mr. Hudson gave parol evidence of the contents of the letter.

Nonsuit, with leave to move to enter a verdict for the plaintiff.

Crowder, and *Taprell*, for the plaintiff.

Jervis, and *Bramwell*, for the defendant.

On a subsequent day, *Crowder* obtained a rule to show cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff, which rule was after argument made absolute; but the ruling of the learned judge as to the point above reported was not questioned.

*51] **Third Sitting at Westminster in Michaelmas Term, 1843.*

BEFORE BARON ALDERSON.

YOUNGE v. HONNER.

If a witness, who is called to disprove the signature of the defendant to an acceptance, states that he believes the signature is not that of the defendant, and gives, as his reason for that belief, the absence or presence of certain peculiarities which he says do or do not exist in the genuine signatures of the defendant, the opposite counsel may put into his hand a paper unconnected with the cause, and ask if, in his opinion, that contains a genuine signature of the defendant; and, if he answer in the affirmative, he may then be asked, "Does the signature in this paper, which you say is genuine, contain the same peculiarities, or want the same peculiarities, (as the case may be,) which you have before stated as your reasons that the signature in dispute is not genuine?" And, semble, that, if the witness says it does not, it would be competent to lay that paper before the jury that they might judge of that answer.

ASSUMPSIT by the plaintiff, as endorsee, against the defendant, as acceptor of a bill of exchange, dated the 2d day of October, 1840, drawn by Henry Younge for £40, payable three months after date to the order of the drawer, and by him endorsed to the plaintiff. Pleas, first, that the defendant did not accept the bill; and, secondly, that the drawer did not endorse it to the plaintiff.

The acceptance on the bill of exchange was, "Accepted, Robert Honner."

On the part of the plaintiff, five witnesses were called, who deposed to their belief that the acceptance was of the handwriting of the defendant; and on the part of the defendant, several witnesses were called, who deposed to their belief that it was not so; and one of them stated that he had never seen a signature of the defendant written "Robert Honner," as the defendant always signed his name "R. W. Honner."

F. V. Lee, for the plaintiff, in cross-examining this witness, put into his hands a paper, not at all connected with the cause, which bore the signature "Robert Honner," and asked the witness if he believed that to be *52] written by the defendant, and the witness said that he believed that it was so.

F. V. Lee proposed to ask the witness whether, looking at that paper, he would now say that he had never seen a genuine signature of the defendant without the initials R. W.

Thesiger, for the defendant.—I submit that it is not competent to the

other side to test the knowledge of the witness by means of another and a genuine instrument which is not in evidence in the cause. In the case of *Griffiths v. Ivory*, 3 P. & D. 179, where, in a case like the present, it was proposed to test the veracity of a witness by putting into his hand a paper: not connected with the cause, and asking him whether that was of the defendant's handwriting, the Court of Queen's Bench held that it could not be done.

ALDERSON, B.—I am of opinion that it is competent to the counsel for the plaintiff to test the knowledge of the witness, or rather the value of the belief of the witness, as to the genuineness of the signature, which is in question; but I will confer with the other learned Barons on the point. [His Lordship, having gone into the Court of Exchequer, which was sitting in Banco, said:] Neither Lord *Abinger*, nor Baron *Parke*, entertain any doubt upon the point. I shall, therefore, as that opinion coincides with my own, receive the evidence, and allow the question to be put.

Humfrey, for the plaintiff.—I hope that your Lordship will favour the bar with the grounds of the decision, as it appears to be in direct opposition to that of the Court of Queen's Bench in the case of [**53* *Griffiths v. Ivory*.

ALDERSON, B.—Certainly. The question before the court is, whether, after a witness has sworn that he does not believe a certain signature to be that of the defendant, and has given as his reason for that belief, the absence or presence of certain peculiarities, which he says do or do not exist in the genuine signatures of the defendant, it is not competent in cross-examination to put another paper into his hands, and, having done so, then to ask him if that paper, in his opinion, contains a genuine signature. If the witness says that it does not, then there must be an end to this course of examination as to him, and to that extent I concur with the case cited; but, if he says it is, then I think that it is a very reasonable mode of testing the value of his opinion, to put this further question: "Does the signature in this paper, which you say is genuine, contain the same peculiarities, or want the same peculiarities, (as the case may be,) which you have before stated as your reasons that the signature in dispute is not genuine?" If the witness says it does not, then probably it would be competent to lay the paper before the jury, that they might judge of that answer. It is not necessary for me, however, to decide that now; but if, as is probable, he admits that it does, and gives no good explanation of that difficulty, then surely it proves that the opinion of the witness upon the matter is not of much value, which is the thing to be judged of by the jury in deciding upon the issue. In these questions of handwriting, depending on opinion and belief, in which it is not possible to contradict the witness directly, because his belief and opinion are matters only within his own breast, it seems to me that any reasonable course of examination, tending to show, as this does, that his opinion and belief are rash and inconsiderate, ought to be allowed. It is observable that our decision is not open to the difficulty suggested in *Griffiths v. Ivory*, that a question would be raised on every paper produced as to its genuineness. I may add, that since consulting the court, I have received a note from the other two judges, Mr. Baron GURNEY and Mr. Baron ROLFE, entirely concurring with this view. The judgment, therefore, that the question should be put, is that of the whole court, though I am alone responsible for the reasons now assigned for it. [**54*

The question was put.

Verdict for the plaintiff on the first issue, and for the defendant on the second issue.^(a)

Humfrey, and *F. V. Lee*, for the plaintiff.

Thesiger, *Butt*, and *Clarkson*, for the defendant.

(a) On the second issue no question of law arose.

*55] *OXFORD SPRING CIRCUIT, 1843.

BEFORE MR. JUSTICE ERSKINE AND MR. JUSTICE WIGHTMAN.

READING ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE ERSKINE.

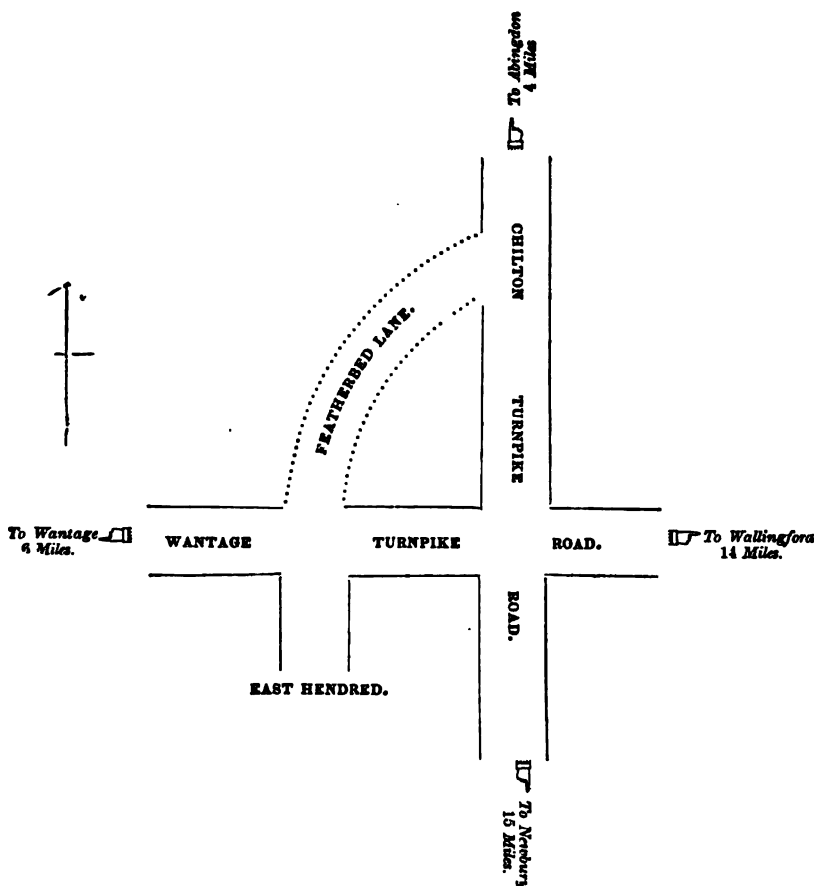
REGINA v. The Inhabitants of the Parish of STEVENTON.

An indictment for non-repair of a highway stated, that there was a queen's highway for carriages, &c., "leading from the town of A. in the county of B., towards and unto the village of E. in the same county," a part of which was out of repair. The part of the road charged to be out of repair was a portion of a lane called F. lane; and it was proved that, to go from the town of A. to the village of E. with a carriage, a person must go four miles along the C. turnpike road, then all along F. lane, and then cross the W. turnpike road, and for a short distance go along a road which goes from the W. turnpike road to the village of E.:—*Held*, that the road was not misdescribed.

INDICTMENT for not repairing a highway.—The indictment charged, "that, before and on the day and year, and during all the time hereinafter mentioned, there was, and still is, a certain common and ancient queen's highway, *leading from the town of Abingdon, in the county of Berks, towards and unto the village of East Hendred, in the same county*," used by and for all the subjects of her majesty and her predecessors, with their horses, coaches, &c., to go, return, &c., at their free will and pleasure; and that a certain part of the same queen's common highway, situate, lying, and being in the parish of Steventon, extending from the west-north-west end of a certain lane, &c., [describing it,] now and yet is out of repair, and that the inhabitants of the parish of Steventon ought to have repaired it.

Plea—Not guilty.

*56] *It appeared that the portion of road which was charged by the present indictment as being out of repair was a part of a lane called Featherbed Lane, which is represented in the sketch by the dotted lines.



It was further proved, on the cross-examination of Mr. Davis, a surveyor, who was called for the prosecution, that, to go from Abingdon to East Hendred, through Featherbed Lane, with a carriage, a person would go from Abingdon along the Chilton turnpike road for a distance of about four miles, and then go into and along Featherbed Lane, and then cross the Wantage turnpike road, and then go for a short distance along a road which goes from the Wantage turnpike road to the village of East Hendred. This witness also stated, that the sketch correctly showed the situation of the different roads. [*57]

Carrington, for the defendants.—I submit that this road is improperly described. It is described as being a part of a queen's highway leading from Abingdon to East Hendred, whereas, in going from Abingdon to East Hendred, a person must not only go along this road, which is a lane, but must also go four miles along the Chilton turnpike road, cross the Wantage turnpike road, and then go along another road from the Wantage turnpike road to East Hendred. This road, which has been called Featherbed Lane, ought to have been described as a highway leading from the Chilton turnpike road to the Wantage turnpike road; and it was held, in the case of *R. v. St. Weonard's*, 6 C. & P. 582, that, if the road is misdescribed, the indictment must fail.

ERSKINE, J.—That case is very different from the present, as there a part of the road which was a carriage way was described as a bridle way.

Carrington.—If the description in the present indictment is sufficient, a road may be described by termini however wide; and a road in Berkshire, running east and west, might be described as part of a road leading from Dover to the Land's End.

ERSKINE, J.—I think that the description of the road is sufficient. It
 *58] is not incorrect, as by this way a person *would go from Abingdon to East Hendred; indeed, on the sketch it appears to be the nearest way for a carriage to go from the one place to the other; and a road is not the less a highway because part of it is turnpike road.

Verdict—guilty.

Godson, and *John Gray*, for the prosecution.

Carrington, for the defendants.

In the ensuing term, *Carrington* applied to the Court of Queen's Bench for a new trial, but the court refused a rule.

REGINA v. The Inhabitants of MILTON.

On the trial of an indictment for the non-repair of a highway, a map of the parish, produced from the parish chest, which map was made under an enclosure act, (which was a private act, not printed,) is not receivable in evidence to show the boundaries of the parish, without proof of the enclosure act; but it being proved by the surveyor who made the map thirty-four years before the trial, that he laid down the boundaries of the parish from the information of an old man, then about sixty, who went round and showed them to him:—*Held*, that, on this proof, the map would have been receivable as evidence of reputation, if it had been also proved that the old man was dead at the time of the trial, but that it was not receivable at all without proof of his death.

INDICTMENT for non-repair of a highway.—The indictment was in precisely the same form as that in the preceding case, and was preferred for the non-repair of another portion of the same lane which was the subject of the indictment in the preceding case.

On the part of the defendant, with a view of showing that the road in question was not situate in the parish of Milton, *Beadon*, for the defendant, proposed to put in a map of that parish, which was produced from the parish chest.

*59] *Godson*, for the prosecution.—A map from the parish chest cannot be evidence in favour of the parish.

Tyrvhitt, for the defendants.—This map was made under the private act of parliament, 49 Geo. 3, c. 64, (not printed,) by which this parish was enclosed. I am not in a condition to give the act of parliament in evidence, as it is strictly a private act, and does not contain any clause, either that it shall be judicially noticed, or that copies printed by the king's printer shall be received in evidence.(a)

(a) A private statute, which does not contain any clause directing how it shall be proved, is usually proved by an examined copy of the parliament roll, but it may be also proved by an exemplification under the great seal; and it is laid down by the Chief Baron Gilbert, (Gilb. on Ev. 10,) that, "in private acts, the printed statute book is not evidence, though reduced into the same volume with the general statutes, but the party ought to have a copy compared with the parliament roll;" but in the case of *Rex v. Shaw*, 12 Ea. 479, where, on an appeal against a rate made under the Wakefield

*ERSKINE, J.—I cannot receive this map in evidence. On the South Wales Circuit I received in evidence a map *which was about thirty years old; it was produced from the Clerk of the Peace's Office, and I received it without the private act of Parliament (an enclosure act) being put in, and the Court of Exchequer held, that, without the private act of Parliament, it was not even evidence of reputation. [*60 [*61]

The evidence was rejected.

It was proved by Mr. Dymoke, that, in the year 1809, he went over the

Enclosure Act, [a private act of Parliament, 33 Geo. 3, c. 11,] the respondent appearing to answer the appeal, and admitting, when called upon by the sessions, that he had made the rate by virtue of this act of Parliament, a printed copy of which, in the common form, was produced by the appellants, and the sessions having thereupon entered into the merits of the appeal, and decided upon them, notwithstanding an objection made by the respondent that the appellants had not given legal evidence of the jurisdiction of the sessions to receive their appeal, for want of proof of the printed copy of the act having been examined with the rolls of Parliament, the Court of King's Bench refused to quash the order of sessions, which was removed by certiorari, and Lord Ellenborough, C. J., said, "In a case like this, the sessions did right in calling upon both parties to say whether they claimed to act under the same act of Parliament, and if the respondent admitted that he made the rate under the act which was produced, it is in derogation of justice, and a disgrace to the administration of the law, to take such an objection."

With respect to what are private acts of Parliament, Lord Chief Baron Gilbert lays down (Gilb. on Ev. 39) that "the distinction between a general and a particular law is, whatever concerns the kingdom in general is a general law, and whatever concerns a particular species of men, or some individuals, is a special law, and must be pleaded; a law which concerns the king is a general law." "A law that concerns all lords is a general law;" "but a law which only concerns the nobility or lords temporal is a particular law;" "what relates to all offices in general is a general law;" "but if it relates to particular persons, as to sheriffs, it is a particular law, as the 23 H. 6, c. 10." [See the case of *Samuel v. Evans*, cited *infra* as to this statute, which relates to bail bonds.] "What relates to all spiritual persons is a general law;" "but what relates to one set of persons is particular, as the act of 1 Eliz. of bishops' leases. An act that comprehends all trades is general, because it relates to traffic in general; but an act that relates only to grocers and butchers, &c., is particular. If the point of law be never so special, yet, if it relates equally to all, it is a general law; but a law relating to some counties or parishes is special."

Mr. Starkie (Law of Ev. vol. 1, p. 231, n. (e)) says, that "if a private statute be recognised by a public act, it will afterwards be judicially noticed, as the statute of bail bonds, 23 Hen. 6, c. 9, which at all events became a public statute when the statute 4 & 5 Anne, c. 16, s. 20, made the bond assignable." *Samuels v. Evans*, 2 T. R. 575. And it is said by the same learned author, (*Ibid.* p. 231,) that, "where a statute is not in express terms made a public statute, it is still such, with a view to evidence, if it be of a general and public nature, affecting all the king's subjects; and therefore it has been ruled at the Assizes (by Mr. Justice Chambre) that a statute, as far as it related to a public highway, was to be considered as a public statute." "But a private act, that concerned Rochester Bridge, though printed by Rastal, was not allowed in evidence. (L. E. 89, pl. 14, *tam qu.*) A private enclosure act, containing clauses respecting public highways, is as to those clauses a public act. (*R. v. Utterby*, Lincoln, Sp. Ass. 1828.) L. C. B. Parker permitted the printed statute concerning the College of Physicians to be read from the printed statute book, printed by the king's printer. (Gilb. on Ev. 10, 13.) A very learned opinion, given by Mr. Justice Holroyd when at the bar, that an act of Parliament, although in other respects private, is, as regards a public highway, to which it refers, to be considered a public act, has, in many instances, been acted upon by magistrates at the sessions. In a late case, *R. v. Stonebeckup*, York Summer Ass. 1839, on an indictment for obstructing a public way, Baron Maule received an award under a local enclosure act, in evidence so far as regarded a public highway set out under the award." "It is said that the act of Bedford Levels, and that for rebuilding Tiverton, are, from the publicity of the subject-matter, public acts, and that a printed copy may be given in evidence. (B. N. P. 225, per Holt, C. J., 12 Mod. 216.) On the other hand, an act of Parliament, private in its nature, is not made admissible in evidence against strangers by the general clause declaring it a public act, which only applies to the forms of pleading, and does not vary the general nature and

*62] parish of Milton to make this map for "the enclosure ; and that an old man went round with him, and showed him the boundaries of the parish ; and that, from that old man's information, he laid down the boundaries on the map.

Godson.—I submit that this is not evidence.

ERSKINE, J.—If the old man is dead, I shall receive the evidence as evidence of reputation.

Tyrwhitt.—We cannot give distinct evidence that the old man is dead, as it is not now known who he was. We can only show that he was an old man in the year 1809.

Mr. Dymoke stated, that the old man appeared, in the year 1809, to be about 60.

ERSKINE, J.—I think that, on this evidence, I cannot hold that the old man may not be living, and, if he be, the proposed evidence of reputation is not receivable.

The evidence was rejected.

Verdict—Guilty.

Godson, and *John Gray*, for the prosecution.

Tyrwhitt, and *F. V. Lee*, and *Beadon*, for the defendants.

REGINA v. LAWES and JAMES.

An indictment for a misdemeanor, which charges that the prisoner unlawfully broke and entered the dwelling-house of R. P., "with intent the goods and chattels in the said dwelling-house, then and there being, then and there feloniously to steal, take, and carry away," is good, although it does not state whose goods the prisoner intended to steal.

MISDEMEANOR.—The indictment charged that the prisoners, "On the 22d day of August, 1842, with force and arms, at the parish of Moultsford,

operation of the act. A power in an act to levy tolls on all persons using a particular navigation is not sufficient to make it a public act as against strangers. (*Brett v. Beales*, M. & M. 417.)"

It is stated by Mr. Phillippis, in some of the earlier editions of his *Law of Ev.* part 2, ch. 1, that "this distinction between public and private acts is not applied in collections of the English statutes at large to any statutes previous to those of Richard the Third. From that period the distinction commences in the several tables prefixed to the respective collections ;" but it is stated by Mr. Raithby, in his edition of the statutes, in his preliminary observations on the statutes of the reign of Richard the Third, (vol. 2, p. 688,) that "two errors have generally prevailed respecting the statutes of this reign ; first, that they afford the earliest instances of the distinction between *public* and *private* acts ; and secondly, that they were originally published in English. It will appear, by a reference to the series of notes given in this edition at the head of the several years, that many acts were made in every Parliament, from the time of Edward 1, which related merely to individuals, and many even of a public nature, not contained in the statutes as proclaimed or published. The statutes of King Richard 3 were printed and published in French immediately after their being passed." And it is stated by the Commissioners on Public Records (App. to 1st Rep.) that, "in the 31st year of Henry 8, the distinction between public acts and private acts is, for the first time, specifically stated on the enrolment in Chancery." As to those local and personal acts of Parliament which are to be judicially noticed, see the case of *Forman v. Dawes*, Car. & M. 127 ; and as to the proof of private acts of Parliament, of which copies, printed by the king's printer, may be given in evidence, see the case of *Greenwood v. Kemp*, Ibid. 635. As to limitation of actions, and costs under "any act or acts commonly called public local and personal or local and personal ;" or "any act or acts of a local and personal nature," and as to the abolition of the pleading of the general issue, and the giving special matter in evidence under such acts, see the stat. 5 & 6 Vict. c. 97. And as to notices of action being given, in *all* cases, where required, "one calendar month, at least, before any action shall be commenced," see the same stat., sect. 4

in the county aforesaid, the dwelling-house of Richard Parsons, there situate, *unlawfully did break and enter, and then and there unlawfully were in the said dwelling-house of the said Richard Parsons, [*63 with intent the goods and chattels, in the said dwelling-house then and there being, then and there feloniously to steal, take, and carry away, against the peace, &c.

The prisoners were convicted, and it was objected by *Price*, for the prisoners, that the indictment was bad, as it did not state whose goods the prisoners intended to steal.

ERSKINE, J., (having conferred with WIGHTMAN, J.)—My brother WIGHTMAN concurs with me in thinking that the indictment is sufficient.

J. Jefferys Williams, for the prosecution.

Price, for the prisoners.

REGINA v. WILLIAM CREED.

If a person, whose duty it is to receive money for his employer, receive money and render a true account of all the money he has received, he is not guilty of embezzlement, if he absconds and does not pay over the money; but if he had received the money and had rendered an account in which it was omitted, this would be evidence to show that he had embezzled the amount.

The collector of a water company, as was his practice, gave the prisoner, who was the turncock, three receipts for water-rents, desiring him to receive the amounts. On a subsequent day, the collector asked the prisoner if he had received the amounts, when he said, that he had, and would pay them over on the following Monday; instead of which, he absconded:—*Held*, no embezzlement.

EMBEZZLEMENT.—The first count of the indictment charged, that the prisoner, being a servant of “The Reading Waterworks Company,” had embezzled the sum of 8s.(a) The second and third counts charged the prisoner *with having embezzled the sums of 10s. and 7s. The fourth count charged the prisoner with having embezzled a half- [*64 sovereign; and the fifth count was for a larceny.

It was opened by *Beadon*, for the prosecution, that “The Reading Waterworks Company” was a corporation established by an act of Parliament,(b) and that the practice was for Mr. West, the company’s collector, to collect the water-rents in advance; but that where parties did not pay him after two or three calls, the receipts for their water-rents were given by Mr. West to the prisoner, who was the turncock of the company; and if the payments of the rent were not made to him, the supply of water was cut off. In the month of February, 1843, receipts for the several sums mentioned in the indictment were given by Mr. West to the prisoner, for him to receive the sums due from the parties named in them for water-

(a) By the stat. 7 & 8 Geo. 4, c. 29, s. 48, it is enacted that “except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.”

(b) The stat. 7 Geo. 4, c. xxxiii., loc. & pers., amended by the stat. 5 & 6 Will. 4, c. xcix., loc. & pers.

rent; and on Saturday, the 12th of February, Mr. West asked the prisoner if he had received these sums, when the prisoner replied that he had received them, and would pay them over to him on the following Monday; the prisoner, however, did not do so, either on that day or the next, and on the Wednesday Mr. West went to the house of the prisoner, and found that he had absconded.

ERSKINE, J.—If the prisoner rendered a true account of the money he had received, it is no embezzlement; if he had received these sums, and *65] had rendered an account *in which the sums were omitted, it would be evidence to show that he had embezzled the amount.

His lordship directed an acquittal.

Verdict—Not guilty.(a)

Beadon, for the prosecution.

Carrington, for the prisoner.

(a) See the cases of *Rez v. Hodgson*, 3 C. & P. 422; and *Reg. v. Norman*, C. & Mar. 501.

REGINA v. BOYNES.

An indictment on the stat. 5 & 6 Will. 4, c. 62, s. 13, for making a false declaration before a magistrate, stated, that, by the rules of a benefit society, any full free member of it who sustained a loss by an accidental fire was to be indemnified to the extent of £15, on making a declaration before a magistrate verifying his loss, and that the defendant was a full free member of the society, and had made a false declaration before a magistrate, that he had sustained a loss by fire. On the trial, the rules of the society could not be proved. But held that the allegations in the indictment respecting the rules might be rejected as surplusage, as the offence of the defendant, in making the false declaration as to the fire, would be an offence within the statute, if no such benefit society had ever existed.

The 18th section of the stat. 5 & 6 Will. 4, c. 62, which enables magistrates to receive voluntary declarations instead of oaths, extends to declarations generally, and is not confined to declarations with respect to the confirmation of written instruments, or allegations, or proofs of debts, or of the execution of deeds, or other matters ejusdem generis.

Where a person is indicted for having made a false declaration as to a fire having taken place at his house, evidence may be given, that, with the declaration, he sent a certificate, which stated the fire to have occurred, and that the signatures to that certificate are all forgeries, as this evidence may go to show that the declaration was wilfully false.

To give evidence of the transcript of the rules of a benefit society enrolled at the office of the clerk of the peace, by proof of an examined copy of it, the witness who examined the copy with the transcript must prove that he examined the copy of *all* the rules with the transcript.

INDICTMENT on the stat. 5 & 6 Will. 4, c. 62, s. 13, for making a false declaration before a magistrate.—The first count of the indictment stated, that the defendant was a full free member of a benefit society, called the Royal Standard, the rules of which society were duly confirmed and certified, and a transcript of them filed with the clerk of the peace, (under the stat. 4 & 5 Will. 4, c. 40, s. 4,) and that, by the 24th rule of that society, *66] it was provided, *that, if any full free member should have his property destroyed by fire, he should produce a certificate, signed by two or more respectable householders, that it was, to the best of their belief, accidental; and that, if the property was not insured, the society would indemnify him to the extent of £15, such claim to be authenticated a solemn declaration before a magistrate; and that William Wright

was treasurer of the society ; that the defendant, designing to obtain from William Wright the sum of 2*l.* 18*s.* for a loss by fire, which he had falsely alleged he had sustained, made a declaration before Samuel Chase, Esq., the mayor of Reading, (he being competent authority, &c.) and, by his said declaration, did solemnly declare that he was a full free member of the society, and that he had sustained a loss by fire, which had accidentally broken out in his dwelling-house, situate in Whitley street, in the borough of Reading, to the amount of 12*l.* 18*s.* ; and that he had forwarded to the society a certificate, as required by the 24th article of their rules ; and that the defendant wilfully and corruptly made the declaration, knowing it to be untrue in this material particular following, that is to say, well knowing, in truth and in fact, that he had not sustained the loss of any property by fire, as in the said declaration was mentioned, to the amount of 12*l.* 18*s.*, or to any other amount whatever, against the form of the statute, &c.

The second count was precisely similar to the first, except that it stated Samuel Parminter and others to be trustees of the society, instead of stating William Wright to be treasurer. The third and fourth counts were precisely similar to the first and second, except that in each the sum of 2*l.* 18*s.* was inserted instead of 12*l.* 18*s.*(a)

It was opened by *Tyrolwhitt*, for the prosecution, that *there was a benefit society, called the Royal Standard Benefit Society, [*67

(a) The fourth count of the indictment is in the following form :—" And the jurors, &c., do further present, that before and at the time of the committing of the offence hereinafter next mentioned, the said J. B. had been and was admitted and then was a full free member of a certain society, called the Royal Standard, held at the Black Prince Tavern, in Chandos street, Covent Garden, in the county of Middlesex, and established in conformity with a certain act of Parliament made and passed in the tenth year of the reign of his late majesty King George the Fourth, intituled 'An act to consolidate and amend the laws relating to friendly societies ;' and that the rules, orders, and regulations of the said society were and had been before that time duly confirmed and certified, according to the directions of the said last-mentioned act of Parliament, as amended by a certain other act of Parliament made and passed in a certain session of Parliament held in the fourth and fifth years of his late Majesty King William the Fourth, intituled 'An act to amend an act of the 10th year of his late Majesty King George the Fourth, to consolidate and amend the laws relating to friendly societies,' and a transcript of which said rules, orders, and regulations of the said society, so confirmed and certified as aforesaid, had been filed with the clerk of the peace in and for the said county of Middlesex, with the rolls of the sessions of the peace of the said last-mentioned county, pursuant to the said act of Parliament lastly above mentioned ; and that, by the 24th article of the said rules, orders, and regulations, it was provided, that, should any full free member of the said society have his goods, tools, or other property destroyed by fire, and make a claim on the said society on account thereof, he must produce a certificate signed by two or more respectable householders in the parish or place where the damage or loss was sustained, that, to the best of their knowledge and belief, the said fire was not wilfully occasioned by such member ; and that, if the property so destroyed was not insured, the society would indemnify him to any amount not exceeding £15, such claim to be authenticated by a solemn declaration before a magistrate. And the jurors, &c. do further present, that, before and at the time of committing the offence hereinafter next mentioned, one Samuel Parminter and others were then and there trustees of the said society, and that the said John Boynes, on the said day and year in this count first mentioned, resided in a certain place called Whitley street, in the said parish of St. Giles, in the borough of Reading, in the said county of Berks. And the jurors, &c., do further present, that the said John Boynes afterwards, to wit, on, &c., at, &c., was then and there minded and designing to obtain, from the said Samuel Parminter and others, the sum of 2*l.* 18*s.* claimed by the said John Boynes to be justly due and payable to him as such full free member of the said society, for and in respect of a certain loss of certain furniture and property of him, the said John Boynes, by fire, which he, the said John Boynes, had falsely alleged in writing that he had sustained ; and that it thereupon became and was material and necessary for the said John Boynes, in the further prosecution of the said design, to confirm and authenticate his aforesaid decla-

*68] held at the Black Prince Tavern, in Chandos *street, Covent-garden; and that, by the 24th rule of that society, it was declared,
 *69] that, if any full free member of *that society should have his goods or other property destroyed by fire, and a claim was made on the society in respect of it, he should produce a certificate, signed by two or more respectable householders in the place where the loss was sustained, that, to the best of their belief, the fire was not wilfully occasioned by such member; and, if not insured, the society would indemnify him to any amount not exceeding £15, such claim to be authenticated by a solemn declaration made before a magistrate. The defendant was a full free member of this society, and, on the 19th of October, 1842, he sent a letter, stating that his goods had been destroyed by fire, and enclosing two papers, the one purporting to be a claim for 12*l.* 18*s.*, the amount of his loss, with a certificate signed by five persons verifying it; the other being a solemn declaration, made under the stat. 5 & 6 Will. 4, c. 62, s. 18, before Mr. Chase, the mayor of Reading, stating that he had sustained a loss by fire, which had occurred at his house on the 8th of October, to the amount of 12*l.* 18*s.* It would be proved that there had been no fire at all at his house, and that the solemn declaration, which had originally stated the loss to be 2*l.* 18*s.*, had been altered to 12*l.* 18*s.*; and it would be also proved that all the signatures to the certificate were forgeries.

On the part of the prosecution, Mr. James Hunter was called. He said, "I am secretary to the Royal Standard Society. I produce a copy of the rules of the society. I went to the clerk of the peace's office of the county of Middlesex, and I saw the transcript of the rules of the society, which

ration and pretended claim, by making a solemn declaration before one of her Majesty's justices of the peace competent by law to take and receive the same. And the jurors, &c., do further present, that the said John Boynes afterwards, to wit, on, &c., at, &c., did go before one Samuel Chase, Esq., then and there being mayor of the said borough of Reading, in the county aforesaid, and then and there being one of her Majesty's justices of the peace in and for the said borough; and did then and there, and within the said borough, voluntarily make and subscribe a declaration before the said Samuel Chase, he the said Samuel Chase then and there being within the said borough, and having sufficient and competent authority to take and receive within the same such declaration so voluntarily made by the said John Boynes in that behalf, according to the form in the schedule annexed to a certain act of Parliament made and passed in the session of Parliament held in the fifth and sixth years of the reign of his late Majesty King William the Fourth, intituled 'An act to repeal an act of the present session of Parliament,' [setting out the title of the stat. 4 & 5 Will. 4, c. 62,] and that the said John Boynes then and there, by his said declaration so then and there made by him within the said borough of Reading, under and by virtue of the said last-mentioned act of Parliament, did solemnly declare, among other things, before the said Samuel Chase, then and there having such sufficient and competent authority as aforesaid, in substance and to the effect following; that is to say, that he, the said John Boynes, was a member of the said society so held at the Black Prince Tavern, Chandos street, Covent Garden, in the county of Middlesex as aforesaid; and that he, the said John Boynes, had sustained a loss of various articles of furniture, and other property, by a fire which accidentally broke out in his dwelling-house, situate in Whitley street, in the said parish of St. Giles, in the said borough of Reading, on the 8th day of October then next preceding, to the amount of 2*l.* 18*s.*; and that he, the said John Boynes, had forwarded to the said society a certificate, as required by the 24th article of the rules of the said society, hereinbefore recited; and so the said jurors do further present, that the said John Boynes did then and there, wilfully and corruptly, make and subscribe the said declaration, knowing the same to be untrue in this material particular following, that is to say, well knowing in truth and in fact that he, the said John Boynes, had not sustained the loss of any furniture, or any property, by any such fire as in his said declaration was mentioned, to the aforesaid amount of 2*l.* 18*s.*, or to any other amount whatever, against
 of the statute in such case made and provided, and against the peace of our Queen, her crown and dignity."

is there enrolled. I examined that transcript with the copy of the rules I now produce." In his cross-examination he said, "I only examined the 24th rule as contained in my copy with the transcript at the clerk of the peace's office. I did not compare my copy of the other rules with the transcript."

Carrington, for the prisoner.—I submit that this is not an *ex- [70
amined copy of the transcript of the rules enrolled with the clerk of
the peace, as the witness has not compared the whole of the rules contained
in his copy with the transcript. An examined copy ought to be an examined
copy of the whole document, except in the case of a parish register or the
like, when the single entry is in effect the whole document so far as it
relates to the subject-matter in question. In the present case it may
well be that some of the other rules may control the effect of the 24th rule,
which the witness examined.

ERSKINE, J.—I think that the whole ought to have been compared by
the witness. To prove the transcript of the rules, either the original
transcript should have been produced from the clerk of the peace's office,
or an examined copy of the whole of it, which this is not.

The evidence was rejected. (a)

Tyrwhitt, for the prosecution.—I submit that the indictment is sufficient
even without the allegations as to the society.

Carrington.—Does your lordship think that the stat. 5 & 6 Will. 4, c. 62,
s. 18, extends to any declarations except those mentioned in the preamble
to that section, and those relating to matters ejusdem generis?

ERSKINE, J.—The 18th section of the stat. 5 & 6 Will. 4, c. 62, is not
confined to cases of voluntary declarations with respect to the "confirmation
of written instruments or allegations, or proof of debts, or the execution
of deeds or other matters" mentioned in the preamble, which might
perhaps mean matters ejusdem generis, but it extends to declarations generally. (b) If there is enough on the face *of this indictment to show [71
that an offence was committed without any reference to the society
or to its rules, that will be sufficient; and I think that that is so; and utile
per inutile non vitiatur.

Carrington.—Every count in the indictment refers to this society, and
avers that the society had certain rules.

ERSKINE, J.—But all that may be rejected as surplusage, if the indictment
would be sufficient without it. The offence of the present defendant
would be equally within the act, if no such society had ever existed.

Mr. Hunter produced and put in a letter which he received from the
prisoner, stating a loss by fire to the amount of 12*l.* 18*s.*, and what pur-
ported to be a certificate signed by five persons who lived near him, certifi-
fying that, to the best of their belief, the fire was accidental.

It was proved by *Mr. Wells*, the assistant clerk to the magistrates, that
he wrote the declaration, which was made in his presence by the defendant
before the mayor, and that the sum then mentioned in it was 2*l.* 18*s.*; but
that the word "two" had been afterwards blotted and altered to look
like "twelve," and the figures "12*l.* 18*s.* 0*d.*" added at the bottom of the
paper

(a) See the case of *Reg. v. Christian*, Carr. & M. 386.

(b) As to the enacting part of a statute not being limited or restrained by the preamble,
see the cases of *Reg. v. Marks*, 3 Ea. 157; *Rex v. Brodribb*, 6 C. & P. 571; and *Rex v.*
Lowlass, Ibid. 596.

The declaration was put in ; it was as follows :—

"I, John Boynes, do solemnly and sincerely declare that I am a member of the Royal Standard Benefit Society, held at the Black Prince Tavern, Chandos street, Covent Garden, in the county of Middlesex ; that I have sustained a loss of various articles of furniture and other property by a fire, which accidentally broke out in my dwelling-house, situate in Whitley street, in the parish of St. Giles, in the borough of Reading, on the 8th day of October instant, to the amount of *twelve* pounds and eighteen shillings.

*72] And I do declare that I have forwarded to the said *society a certificate, as required by the 24th rule of the said society. And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of an act made and passed in the 6th year of the reign of his late Majesty King William the Fourth, intituled "An act to repeal," &c. [setting out the title of the stat. 5 & 6 Will. 4, c. 62.]

"JOHN BOYNES.

"Taken and solemnly declared before me, the seventeenth day of October, 1842.

"£12 18s. 0d.

"SAMUEL CHASE,
Mayor of Reading, Berks."

The certificate was as follows :—

"We, the *under sign*, do hereby certify, that, to the best of our *believe* and knowledge, that the fire that took place at Mr. John Boynes, of No. 19, *Withley street*, on Saturday, October 8th, was occasion *quiet* by accident.

"Wm. BERKSHIRE, Withley street.

"T. SMITH, 20, Withley street.

"W. ANNETT.

"T. HOLDEN, Southampton street.

"V. SHAW."

Tyrwhitt, for the prosecution, proposed to call the several persons whose names purported to be signed at the foot of the certificate, to prove that the signatures were forgeries.

Carrington, for the defendant.—I submit that this evidence is not receivable. The question here is, whether the defendant made a false declaration, and on that question it is perfectly immaterial whether the names to a certificate are genuine or not.

ERSKINE, J.—I must receive the evidence, as it may go to show that the declaration was wilfully false.

The evidence was received.

*73] *Evidence was given to show that there had been no fire at the defendant's house.

Verdict—guilty.(a)

Tyrwhitt, for the prosecution.

Carrington, for the defendant.

(a) As to the administering of oaths by a magistrate, in cases where they ought not to be administered, contrary to the 13th sect. of the stat. 5 & 6 Will. 4, c. 62, see the case of *Reg. v. Nott*, *Eq., Car. & M.* 288; and 12 Law J., N. S., Mag. Ca. 143.

(Crown Side.)

BEFORE MR. JUSTICE WIGHTMAN.

REGINA v. PAICE.

On an indictment on sect. 2 of the stat. 7 Will. 4 & 1 Vict. c. 89, for the capital offence of setting fire to a dwelling-house, some person being therein, (the indictment not charging any intent to injure or defraud any person,) the prisoner cannot be convicted of the transportable offence of setting fire to the house, under sect. 3 of that statute, as an allegation of an intent to injure or defraud some person is essential to an indictment under sect. 3 of that statute.

ARSON.—The indictment, which contained only one count, charged that the prisoner, on, &c., at, &c., “feloniously, unlawfully, and maliciously, did set fire to a certain dwelling-house of John Sloper, clerk, there situate, the said John Sloper and Clementina Georgina, his wife, then and there being therein, against the form of the statute,” &c.

It appeared that the fire occurred at between seven and eight o'clock on the evening of the 7th of February, 1843, but it was not distinctly proved that either Mr. or Mrs. Sloper were in the house at the time of the fire.

**Selfe*, for the prisoner.—This indictment is framed on the statute 7 Will. 4 & 1 Vict. c. 89, s. 2, by which it is enacted, “that whoso-
[*74
ever shall unlawfully and maliciously set fire to any dwelling-house, *any person being therein*, shall be guilty of felony, and, being convicted thereof, shall suffer death;” and in an indictment so framed, I submit that he cannot be convicted of the transportable offence of setting fire to the house under the third section of that statute; as, to constitute the felony under that section of the statute, it must have been committed with intent to “injure or defraud” some person, which is not alleged in this indictment, that being, as I submit, a material allegation.

WIGHTMAN, J.—There is no allegation here of an intent to defraud or injure any person, which is essential to an indictment on the third section of this statute. If the case cannot be sustained on the second section, it must on this indictment fail altogether.

Verdict—Not guilty.

F. V. Lee, and Keating, for the prosecution.

Selfe, for the prisoner.

*OXFORD ASSIZES.

[*75

(Crown Side.)

BEFORE MR. JUSTICE ERSKINE.

REGINA v. SAVAGE and PENN.

If it is moved, on the part of the prosecution in a case of felony, to put off the trial, on the ground of the absence of a material witness, who has not made a deposition before the committing magistrate, the judge will require an affidavit stating what points the witness is expected to prove, in order that he may form a judgment as to the witness being material or not.

An affidavit of a surgeon, that the witness is the mother of an unweaned child, which is afflicted with inflammation of the lungs, and that the child could neither be brought to the assize town nor separated from its mother without danger to its life, is sufficient ground for the absence of the witness, in order to found a motion to postpone the trial.

THE prisoners had been committed on a charge of stealing notes of the Farnham Bank from the person of William Broomhead.

Keating, for the prosecution, moved to postpone the trial till the next assizes, on the ground of the absence of a witness named Eliza Moorston. He moved on two affidavits, one of which was the affidavit of Mr. Clark, a surgeon at Farnham, which was sworn before Mr. Hollest, a commissioner for taking affidavits in the Court of Queen's Bench, which stated "that he hath attended the child of Eliza Moorston, of Farnham, aforesaid, widow, for three days now last past; that the said child is now suffering from inflammation of the lungs, and any exposure of such child to the air would endanger the life of the said child. That the said child is about seven months old, and is now suckled by the said Eliza Moorston, the mother; and, further, that any separation of the mother from the child would likewise endanger the life of the child; and, moreover, that the attendance of the said Eliza Moorston, at the Oxford Assizes, on Monday, the 27th instant, is, under the circumstances, impossible:" the other being the affidavit of Mr. Percival Walsh, the solicitor for the prosecution, in which he stated that he had seen the child of Eliza Moorston, on the 26th of February, and that the child was very ill, and that he was informed by

*76] Mr. Clark that "the bringing the child to Oxford, or the separating it from its mother, would be dangerous to its life; and that Eliza Moorston was a material witness for the prosecution.

ERSKINE, J.—Has a bill been found by the grand jury?

Keating.—It has not yet been presented.

ERSKINE, J.—It would be better to send the case first before the grand jury, and, if a true bill is returned, to renew the application.

The grand jury having returned a true bill against the prisoner, *Keating* renewed his application to postpone the trial.

ERSKINE, J.—As the witness on whose absence the motion is founded was not examined before the magistrates, I am not able to form an opinion from the depositions before me, whether the evidence expected to be given by her is material or not. I must, therefore, have the fact of her testimony being material to the ends of justice verified by an affidavit as to what she is expected to prove. If that be supplied, I shall grant the application, as I consider the statement of the surgeon amply sufficient to account for the absence of the witness.

A further affidavit of Mr. Percival Walsh was afterwards put in, in which he stated "that the evidence of Eliza Moorston, of Farnham, in the county of Surrey, widow, is most material on the part of the prosecution, as she stated to this deponent she could prove that, on the 22d day of September, 1841, the said Eliza Moorston paid to William Broomhead, whose body was found dead at Blackthorn, in the county of Oxford, on the 11th day of October, 1841, the sum of eight pounds and thirteen shillings, consisting of a £5 note of the Farnham Bank, numbered 632, *which
*77] identical note appears to have been paid away by the prisoner, Ezekiel Savage, on the 13th day of the said month of October. And this deponent further saith, that the said Eliza Moorston is the only witness who can prove the said note to have been so paid to the said William Broomhead, as aforesaid."

ERSKINE, J., on these affidavits, ordered the trial to be postponed till the next assizes, and that the prisoners might be admitted to bail.

Keating and *G. K. Rickards*, for the prosecution.

Price, for the prisoners.

REGINA v. POLLY and BOWELL.

The alterations made in the law with respect to burglary by the stat. 7 Will. 4 and 1 Vict. c. 86, as to the hours, and as to the punishment, do not make it necessary for an indictment for that offence to conclude *contra formam statuti*, as the alteration with respect to the hours does not alter the offence, and the mere diminution of the punishment does not make that conclusion necessary.

BURGLARY.—The indictment was in the usual form, and charged that the prisoners, on the 1st October, 1842, in the night-time, broke and entered the dwelling-house of John Langston, at Ifley, with intent to steal his goods, and stole a piece of cheese and other articles, his property. The indictment did not conclude “against the form of the statute.” The jury found the prisoners guilty.

F. V. Lee, for the prisoners.—I submit that the judgment in this case ought to be arrested, because the indictment does not conclude “against the form of the statute.” Before the stat. 7 Will. 4 & 1 Vict. c. 86, s. 4, burglary consisted in breaking into a dwelling-house in the night-time: and at common law, if there was light enough to discern a man’s features, it was not burglary; but by the stat. 7 Will. 4 & 1 Vict. c. 86, it is enacted, that for the *purposes of burglary the night shall be considered to commence at nine, P. M., and to conclude at six, A. M., on the next [*78 day—the effect of this being, that that which was formerly not burglary is made so now, because where a party now breaks into a house in the middle of summer, at a little before six, A. M., it is burglary, which it would not have been at common law. The statute therefore creates a new species of burglary. By the common law burglary was a capital offence; and by the stat. 7 & 8 Geo. 4, c. 29, s. 11, persons guilty of burglary were to suffer death; but by the stat. 7 Will. 4 & 1 Vict. c. 86, s. 3, burglary is now punishable with transportation or imprisonment; and I submit that, as the punishment of the offence is altered by statute, the indictment must, on that ground, conclude “against the form of the statute.” It is laid down by Mr. Archbold,^(a) that, “where a statute either creates the offence altogether, or makes an offence at common law an offence of a higher nature, (as, for instance, where it makes a misdemeanor or a felony,) an indictment for the offence must conclude, ‘*contra formam statuti*.’ If the statute do not make it an offence of a higher nature, but merely increase or otherwise alter the punishment, &c., (as, for instance, perjury, under stat. 5 Eliz. c. 9,) the indictment, in order to bring the offence within the statute, must conclude ‘*contra formam statuti*;’ but if it do not so conclude, it may still be a good indictment for the offence at common law; or if the statute be merely declaratory of an offence at common law, (as high treason for instance,) without adding to or altering the punishment, &c., an indictment for the offence may conclude ‘*contra formam statuti*,’ or as at common law.” For these propositions Mr. Archbold cites Lord Hale’s Pleas of the Crown.^(b)

(a) Arch. Cr. Pl. 9th ed., p. 56.

(b) 2 H. P. C. 199, 191, 192.

Secker, for the prosecution.—The offence of burglary is not created by statute, and the definition of it remains as *before—a breaking and
 *79] entering in the *night-time*, and it is so alleged in the present indictment; and no indictment for burglary ever alleged the offence to have been committed within the hours newly limited by the statute; and if in any case an alteration in the punishment rendered it necessary for the indictment to conclude “*contra formam statuti*,” that would not apply to cases where the punishment was diminished. Indeed, in the very same page of Mr. Archbold’s book that has been already cited, it is laid down, that, where a statute merely takes away a certain privilege or benefit from a person committing a common-law offence under particular circumstances, as when it takes away the benefit of clergy from a common-law felony, the indictment need not conclude “*contra formam statuti*.” Thus indictments for murder, manslaughter, robbery, burglary, housebreaking, stealing in a dwelling-house, or the like, need not include “*contra formam statuti*,” unless in the latter instance a larceny be committed, a thing which at common law was not the subject of larceny; and in the case of *Regina v. Blea*, 8 C. & P. 735, it was held, that, in order to warrant a sentence of transportation for life on an indictment for a larceny, after a previous conviction for felony, it was not necessary for the indictment to conclude “*contra formam statuti*.”

ERSKINE, J.—I have considered the objection to this indictment, and am of opinion that the indictment is sufficient. By it the prisoners are charged with burglary, the indictment being in the old form, charging a breaking and entering a dwelling-house in the night with intent to steal, and stealing certain goods; and the objection is, that it does not conclude “*contra formam statuti*.” The objection was put in two ways; first, on the ground that a recent statute had altered the offence; and, secondly, that the punishment had been altered. On the first ground, it was said
 *80] *that the stat. 7 Will. 4 & 1 Vict. c. 86, had altered the offence by substituting the hours nine and six for the old hours, and that therefore the “*contra formam statuti*” became necessary. It appears to me that the offence is not altered by the statute. Burglary is the breaking and entering a dwelling-house in the night-time with intent to commit felony. The common law fixed the test of night as being when a man’s features could not be discerned. This was found to be inconvenient, and the legislature, by the stat. 7 Will. 4 & 1 Vict. c. 86, s. 4, has enacted, “that, so far as the same is essential to the offence of burglary, the night shall be *considered* and is hereby *declared* to commence” at nine P. M., and to conclude at six, A. M., on the next succeeding day. This does not at all alter the offence; and therefore, on that ground, the present indictment need not conclude “*contra formam statuti*.” The other ground for the objection was, that the punishment was altered by statute, and a passage from Mr. Archbold’s work on the criminal law was cited, as showing that any alteration of the punishment made the conclusion “*contra formam statuti*” essential to the indictment; and if that passage had been a correct transcript of the passage in Lord Hale, it would seem that the conclusion “*contra formam statuti*” was required, even where the punishment was reduced; and if that were so, the indictments for burglary, horse-stealing, larceny, and several other offences preferred within the last few years have been all bad. However, on referring to the passage in Lord Hale, it does not appear to me to point to a case like this, as Lord Hale says, (a) “If

an offence be at common law, and also prohibited by statute, with a corporal or other penalty, yet it seems the party may be indicted at common law, and then, though it conclude not 'contra formam statuti,' it stands as an indictment at common law, and can receive only the penalty that the common law inflicts in that case. Thus "an indictment for a riot is good, though it conclude not 'contra formam statuti,' because an offence at common law, though prohibited also by acts of Parliament under severer penalties." This appears to apply to a case where there had been a common-law offence, and a statute has afterwards prohibited that offence, and given a new punishment. The stat. 7 Will. 4 & 1 Vict. c. 86, merely alters the punishment by reducing it, and the words of the statute are, "that whosoever shall be convicted of the *crime of burglary*" shall be liable to be transported, &c.; and not whosoever shall break and enter a dwelling-house in the night-time with intent to steal shall be transported, &c. I am, therefore, of opinion that this statute not having altered the offence, and not having prohibited the offence, but merely having reduced the punishment, it is not necessary that the indictment should conclude "against the form of the statute," and the present indictment for burglary is therefore good.(a)

Sentence was passed on the prisoners for the burglary.

Secker, for the prosecution.

F. V. Lee, for the prisoners.

(a) We are informed by Mr. Keating, that, in the case of *Reg. v. Andrews*, for horse-stealing, tried before Baron Alderson at the Oxford Summer Assizes, 1839, he took a similar objection to the indictment, which, after time taken to consider, was overruled by the learned baron.

*REGINA v. DANIEL CAMPBELL.

[*82

D. C. was indicted for manslaughter, in killing "a certain woman, whose name to the jurors is unknown." D. C. cohabited with the woman, and sometimes said that she was his wife, and sometimes that she was not; and none of the witnesses had heard her called by any name:—*Held*, that, if the jury were satisfied that the deceased was not the wife of the prisoner, and that the name of the deceased could not be ascertained by any reasonable diligence, the description of the deceased was proper; but that, if the jury should think that the deceased was the wife of the prisoner, the description was bad; for, although there was no evidence of her Christian name, she was entitled to the surname of C., as being that of her husband.

MANSLAUGHTER.—The first count of the indictment charged the prisoner with having killed Catherine Macginniss, by beating and striking her. In the second count the deceased was described as Catherine Campbell; and in the third count, "as a certain woman whose name to the jurors is unknown."

There was no evidence of the name of the deceased being that which was stated in either the first or second counts; but it appeared that, on Wednesday, the 15th of November, 1842, the prisoner came to the Coach and Horses public-house, at Oxford, and asked Mrs. Guise, the landlady, if he could have lodgings "for himself and his wife;" that she said that he could; and that, on the same afternoon, the prisoner and deceased came to her house, and remained there, living together as husband and wife till the following Saturday, the 19th, when the prisoner went away, and the deceased went up stairs, and lay on her bed, complaining of her head, and

died the next day. Neither of these witnesses knew the name of the deceased, or ever heard her called by any name; but it was proved by Mr. Lucas, the city marshal at Oxford, that, when he took the prisoner into custody, he asked the prisoner if he had a wife in Oxford, and the prisoner said that he had; and that, on his, the marshal's, saying she was dead, the prisoner replied, "She is not my wife; she is a woman I have been travelling with for the last eight months."

ERSKINE, J.—I shall leave it to the jury to say, upon this evidence, whether the deceased was the wife of the prisoner or not. There is no evidence of any Christian name; but, if she was his wife, she was entitled to the name of Campbell, as that is the surname by which the prisoner has been indicted, and to which he has pleaded. If the jury should think that
 *83] the deceased was not the *wife of the prisoner, the description of the deceased in the third count of the indictment is correct.

The prisoner was called on for his defence.

ERSKINE, J., (in summing up).—The prisoner is charged in the third count of this indictment with having feloniously killed "a certain woman whose name to the jurors is unknown." If you think that the deceased was not the wife of the prisoner, and that the name of the deceased could not be ascertained by any reasonable diligence, that description is proved. You will probably think that, when the prisoner told the city marshal that the deceased was not his wife, he told the truth, and that he spoke of her to the landlady of the Coach and Horses as his wife, because he thought that, if he had told her they were not married, the landlady would not have let them have lodgings there. [His Lordship then summed up the case upon the merits.]

Verdict—Not guilty.(a)

Carrington, for the prosecution.

(a) In the case of *Rex v. Robinson*, Holt, N. P. C. 595, the prisoner was indicted for plundering a vessel which was wrecked. In the first count of the indictment, the property was laid in the persons therein named; and in a second count, in persons unknown. At the trial the witnesses for the prosecution did not know the Christian names of some of the owners mentioned in the first count, and the counsel for the prosecution then proposed to rely on the second count; but Lord Chief Baron Richards held, that the prisoner must be acquitted; and his lordship said, "The owners, it appears, are known, but the evidence is defective on this point. How can I say that the owners are unknown? I remember a case at Chester, before Lord Kenyon, where the property was laid as belonging to a person unknown, but upon the trial it was clear that the owner was known, and might easily have been ascertained by the prosecutor. Lord Kenyon directed an acquittal."

*84]

*STAFFORD ASSIZES.

(*Crown Side.*)

BEFORE MR. JUSTICE WIGHTMAN.

REGINA v. GILBERT and Others.

On the trial of an indictment for breaking into a building within the curtilage, under the stat. 7 and 8 Geo. 4. c. 29, s. 14, it appeared that the building was in the fold-yard of the prosecutor's farm, and that, to get from his dwelling-house to the fold-yard, it was necessary to pass through a yard called the pump-yard, into which the back-door of the dwelling-house opened, the pump-yard being separated from the fold-yard

by a wall four feet high, in which there was a gate. The fold-yard having another gate leading to fields on one side, a hedge with a gate leading to the high road on another, the other sides of the fold-yard being bounded by the farm buildings, and a continuous wall from the dwelling-house:—*Held*, that the building was within the curtilage.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 29, s. 14, for breaking into a building within the curtilage of the dwelling-house of Charles Averill, and stealing wheat.

It appeared that the building broken into was situate in the fold-yard belonging to the prosecutor's farm; and that, to go from his dwelling-house into the fold-yard, it was necessary to pass through a yard called the pump-yard into which the back-door of the dwelling-house opened; the pump-yard being separated from the fold-yard by a wall four feet high, in which there was a gate. The fold-yard having a gate leading to fields on one side, and, on another, a hedge, with a gate opening into the high road; the other sides of the fold-yard being bounded by the farm buildings, and by a continuous wall from the dwelling-house, but the building in question could only be approached from the dwelling-house by going through the pump-yard.

E. Yardley, for the prisoners Woods, submitted, that this building was not within the curtilage of the prosecutor's dwelling-house; and that, as the fold-yard was separated from the dwelling-house by the pump-yard, which was walled in, the buildings in the fold-yard could not be considered as within the curtilage of the dwelling-house.

WIGHTMAN, J., (having conferred with ESKINE, J.)—We are of opinion that this building is within the curtilage.

Verdict—Guilty of larceny.

Corbett, and *F. V. Lee*, for the prosecution.

Yardley, for the prisoners Woods.

*(Civil Side.)

[*85

BEFORE MR. JUSTICE ERSKINE.

HIGGS v. TAYLOR, Gent., &c. &c.

In an action against an attorney for negligence respecting a reference of an action for breach of promise of marriage, brought by Miss S. against the present plaintiff, in which he was attorney for the present plaintiff, it appeared that there were two parts of the agreement to refer, one signed by Miss S.'s attorney, (unstamped,) which was in the possession of the present defendant, the other signed by the present defendant as attorney for the present plaintiff, and in the hands of Miss S.'s attorney. The latter had been stamped within twenty-one days after its execution, and the expense of the stamping, and part of the expense of the making of it, had been paid by the present plaintiff, the rest being taxed off. The part in the hands of the present defendant being called for and produced under a notice to produce, being unstamped, could not be read in evidence:—But *held*, that the present plaintiff was entitled to have the stamped part of the agreement produced by Miss S.'s attorney, although Miss S. had desired her attorney not to produce it. *Held*, also, that Miss S.'s attorney was not bound to produce letters written to him by the present defendant, as attorney for the present plaintiff, he stating that he was desired by his client, Miss S., not to produce them; but that, if letters written by Miss S.'s attorney to the present defendant, as attorney for the present plaintiff, were not produced when called for under a notice to produce, Miss S.'s attorney was bound to give secondary evidence of their contents, although desired by Miss S. not to do so.

CASE against the defendant, as an attorney, for negligence respecting a reference of an action for a breach of promise of marriage, which had been brought against the present plaintiff by Miss Mary Slaney, in which action the present defendant was the attorney of the present plaintiff. The defendant pleaded seven pleas, which, in substance, were—not guilty; a denial of his retainer by the plaintiff; a denial of the agreement for the reference; a denial of the duty alleged in the declaration; and a plea, alleging that the reference was not proceeded with from the wilful default and neglect of the plaintiff himself.

It was opened by *Talfourd*, Serjt., for the plaintiff, that in the year 1839 an action for breach of promise of marriage had been brought by Miss Slaney, against the present plaintiff; and that, on the 10th of July, 1840, the attorneys of Miss Slaney, and the present defendant, as attorney for the present plaintiff, had entered into an agreement to refer the cause to two arbitrators, one named by each party; and that judgment should be signed *86] against the present plaintiff in that action for £500, the *damages in the declaration; that, there being no power of enlarging the time for the award beyond the 10th of October, 1840, nothing was done on the reference. After that an execution was taken out against the present plaintiff for £500, and the costs, which he was obliged to pay; the defendant, as his attorney, neither having proceeded with the reference, nor taken any step to procure the judgment to be set aside.

On the part of the plaintiff, Mr. Thomas Rushton was called. He said, "I hold the agreement for the reference, but I am desired by Miss Slaney not to produce it, unless his lordship decides that I must do so. I have the agreement now in my possession, and I had it when I was subpoenaed to produce it. There were two parts of it. The one which I have was written by the present defendant, and signed by him for himself and his partner, as attorneys for the present plaintiff. That part of the agreement was stamped in July, 1840, and within twenty days after it was signed; the reference extended to the following October. The other part of the agreement I signed as attorney for Miss Slaney, and sent it to the present defendant as attorney for the present plaintiff. I had my costs taxed, and the sum at which they were taxed was paid by the present plaintiff. This agreement, and the stamping of it, were included. The present plaintiff paid the whole expense of the stamp, and part of the expense of drawing this agreement, the remainder of the expense being taxed off, and that was paid to me by Miss Slaney."

Talfourd, Serjt., for the plaintiff, under a notice to produce, called for that part of the agreement which was in the hands of the defendant.

R. V. Richards, for the defendant, produced it; but it could not be read, because it was unstamped.

*87] *Talfourd*, Serjt.—I submit that Mr. Rushton must *produce the part of the agreement which he holds. It belongs to the present plaintiff. He paid for it, and paid for the stamping.(a)

ERSKINE, J.—That part of the agreement ought to be produced. It appears to have been stamped for the benefit of all parties. Mr. Rushton must produce it.

Mr. Rushton produced the part of the agreement which had been stamped.

R. V. Richards.—I hope that your lordship will take a note of the objection

(a) See the case of *Turner v. Hardey*, Carr. & M. 449.

ERSKINE, J.—I do not think that you have any thing to do with it; you are not counsel for Miss Slaney.

The part of the agreement produced by Mr. Rushton was read.

Talfourd, Serjt., desired Mr. Rushton to produce the letters written by the present defendant, as the attorney of the present plaintiff, to him, (Mr. Rushton,) as the attorney of Miss Slaney.^(a)

*Mr. Rushton said that Miss Slaney had desired him not to produce them. [*88

ERSKINE, J.—I cannot compel him to produce these letters.

Talfourd, Serjt., (under a notice to produce,) called for the letters written by Mr. Rushton, as attorney for Miss Slaney, to the present defendant, as attorney for the present plaintiff.

R. V. Richards declined to produce them.

Talfourd, Serjt., desired Mr. Rushton either to produce his copies of them, or to state their contents.

Mr. Rushton.—My Lord, Miss Slaney has desired me not to do so.

ERSKINE, J.—The letters you write to other people are not the property of Miss Slaney, nor can your memory of the contents of letters sent by you for Miss Slaney to an opposite party be considered as her property either. As the original letters are not produced by the present defendant, you must state their contents from your memory, *and may refresh your memory from any copies or memorandums of their contents made by you at the time. [*89

A juror was withdrawn by consent.

Talfourd, Serjt., *Whateley*, *Carrington*, and *Meteyard*, for the plaintiff.

R. V. Richards, and *F. V. Lee*, for the defendant.

(a) In the case of *Wheatley v. Williams*, (1 M. & W. 533,) it was held, that an attorney is not compellable to state, when examined as a witness, whether a document shown to him by his client in the course of a confidential consultation with his attorney was then in the same state as to being stamped as it was when produced on the trial; and in that case Baron Alderson said, "I think the privilege extends to all knowledge that the attorney obtains which he would not have obtained but for his being consulted professionally by his client." In B. N. P. 284, it is said, that "an attorney may be examined to a fact of his own knowledge, and of which he might have had knowledge without being an attorney; as, suppose him witness to a deed produced in the cause, he shall be examined to the true time of execution. So, if the question be about an erasure in a deed or will, he might be examined to the question, whether he had ever seen such a deed or will in other plight, for that is a fact of his own knowledge, but he ought not to be permitted to discover any confessions his client may have made to him on such head." But Lord Abinger, C. B., says, (1 M. & W. 541,) that the passage above cited from Buller's *Nisi Prius* "must apply to a case where the attorney has his knowledge independently of any communication from the client; it cannot mean, that, where the attorney, coming to the client for a confidential purpose, obtains some other collateral information which he could not otherwise have possessed, he can be compelled to disclose it. Suppose an attorney, when searching for a deed belonging to his client, found another deed which might operate to the client's prejudice, can it be said that he is bound to disclose it? If, therefore, a document be exhibited to the attorney in pursuance of a confidential consultation with his client, all that appears on the face of such document is a part of the confidential communication."

SHROPSHIRE ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE WIGHTMAN.

REGINA v. HANNAH HARLEY.

A post-office being at an inn, a person was sent to put a letter, containing promissory notes, into the post. He took it to the inn with money to prepay the postage; he did not put it into the letter-box, but laid the letter, and the money upon it, upon a table in the passage of the inn, in which passage the letter-box was, and he pointed out the letter to the prisoner, who was a female servant at the inn, who said she would "give it to them." The prisoner, who was not authorized by the innkeeper, her master, to receive letters for him, stole the letter and its contents:—*Held*, that this was not a "post-letter" within the stat. 7 Will. 4 & 1 Vict. c. 36, ss. 27, 28, and that the stealing of the letter and its contents by the prisoner was not an offence within either of those sections.

INDICTMENT on the stat. 7 Will. 4 & 1 Vict. c. 36, ss. 27 and 28. (a)
 *90] The first count of the indictment charged, "that the prisoner, on the 8th day of August, 6th Vict., at, &c., "feloniously did steal, take, and carry away *from and out of a certain post-letter*, to wit, a post-letter addressed Messrs. Adams & Co., bankers, Shrewsbury, six valuable securities; that is to say, two promissory notes for the payment of the sum of ten pounds each, one bank-note for the sum of ten pounds, [describing the other promissory notes stolen, but not alleging any of them to be unsatisfied,] then and there respectively sent by the post, of the property, goods, and chattels of her Majesty's Postmaster-General, against the form of the statute," &c. Second count, that the prisoner, on, &c., at, &c., "feloniously did steal, take, and carry away *from a certain post-office* there situate *a certain other post-letter*, to wit, a post-letter directed and addressed to and for certain persons at Shrewsbury, in the county aforesaid, by the name and style of Messieurs Adams and Company, the said post-letter in this count mentioned being then and there the property, goods, and chattels of her Majesty's Postmaster-General, against the form of the statute," &c. The third count charged the prisoner with stealing the notes [describing them] "then and there respectively *sent by post*, of the property, goods, and chattels of her Majesty's Postmaster-General, in the dwelling-house of William Haverkam there situate, the said several sums of money secured by and upon the said promissory notes and bank-notes respectively in this count mentioned being then and there respectively due and unsatisfied to her Majesty's Postmaster-General, the proprietor thereof respectively, against the form of the statute," &c. The fourth count charged that the prisoner, being a servant of William Haverkam, stole the notes

(a) By the stat. 7 Will. 4 & 1 Vict. c. 36, s. 27, it is enacted, "that every person who shall steal from and out of a post-letter any chattel, or money, or valuable security, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life."

And by sect. 28 of the same statute it is enacted, "that every person who shall steal a post-letter bag, or a post-letter from a post-letter bag, or shall steal a post-letter from a post-office, or from an officer of the post-office, or from a mail, or shall stop a mail with intent to rob or search the same, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life."

"then and there respectively sent by the post," the property of the Postmaster-General, "and in the possession of the said William Haverkam, her master," the money secured by the notes being unsatisfied to the Postmaster-General, the proprietor thereof, as in the third count. The fifth count charged that the prisoner was the servant of William Haverkam, [*91 and stole the notes from her master, laying the property in him, and averring that the money secured by the notes was unsatisfied to him. Sixth count, for a larceny in stealing the notes, laying the property in John Robinson and another. Seventh count, the like, laying the property in Charles Marsh Adams, and others.

It was proved by Mr. Holme, who was the partner of Mr. Robinson, that, on the 8th of August, 1842, he inclosed the notes in question in a letter addressed to Messrs. Adams & Co., bankers, at Shrewsbury, and gave the letter, with its contents, to his apprentice, Christopher Tomlinson, to put into the Church Stretton post-office; and it was proved by Christopher Tomlinson, that he took the letter to the Talbot Inn at Church Stretton, and placed it upon a table under the bar window in the passage, which passage leads into the kitchen; and that upon the letter he placed two-pence, to prepay the postage, and the prisoner being near, he pointed the letter out to her, when she said, "They will be here directly, I will give it to them," and he then went away. It was proved by Mr. Haverkam, that the post-office at Church Stretton is at his house, which is the Talbot Inn, and that the letter-box, which is in the before-mentioned passage leading to the kitchen of the Talbot Inn, is always kept locked. It was further proved by Mr. Haverkam, that the prisoner was in his service on the 8th of August, 1842, but that he had never authorized the prisoner, or any other of his servants, to receive letters for him. Evidence was given to show that the prisoner had stolen the letter and its contents.

F. V. Lee, for the prisoner.—I submit that the prisoner must be acquitted on the first four counts of this indictment. The first count is for stealing notes "from and out of a certain post-letter;" the second, for stealing "a certain other post-letter;" the third, for stealing notes "sent by post;" and the fourth is, as to this part of the case, similar to the third. It is, [*92 therefore, essential to all these different modes of stating the offence, that this should have been a "post-letter," which it certainly was not, as it was neither put into the letter-box, which would have made it a post-letter, nor was it delivered to any postmaster, or any person authorized by the post-office, or even authorized by the postmaster to receive letters for him.

WIGHTMAN, J.—I think that, as to those counts, the objection must prevail, and that this letter was neither a "post-letter," nor were the notes contained in it "sent by the post."

Verdict—Guilty of larceny on the sixth count.(a)

Whateley and *Whitmore*, for the prosecution.

F. V. Lee, for the prisoner.

(a) See the cases of *Rex v. Pearson*, 4 C. & P. 572; and *Regina v. Rathbone*, Car. & M. 220. The indictment in the former of these cases was framed upon the stat. 52 Geo. 3. c. 143, of which "so much as relates to the post-office" is now repealed by the stat. 7 Will. 4 & 1 Vict. c. 32, sch. (A.)

*93]

*(Civil Side.)

BEFORE MR. JUSTICE WIGHTMAN.

ROBERTS v. JUSTICE, Esq.

A. brought trover for goods which had been seized at the house of B. by the defendant, as sheriff of S., under a *fi. fa.* against B. A. claimed under a sale at auction, which was stated at the time of the sale to have been made under an assignment by B. for the benefit of his creditors. To show that the sale was fraudulent, the defendant's counsel proposed to give evidence, that, when the execution went in, and while the goods remained in B.'s possession, B. said that the goods were his son's:—*Held*, that this evidence was not receivable.

TROVER for household furniture and casks.—Pleas: first, not guilty; second, not possessed.

The present action was brought to recover the value of household furniture and casks, which had been sold by the defendant, as sheriff of Shropshire, under a writ of *fi. facias* against William Botwood, on the 4th of May, 1841. With respect to the casks no question of law arose, as the case on the part of the plaintiff was, that they were his casks, which he had lent to Botwood; but with respect to the furniture, it was proved, on the part of the plaintiff, that, on the 26th of April, 1841, the furniture had been sold by auction on Botwood's premises, and that the auctioneer stated that the furniture had been assigned by Botwood for the benefit of his creditors, and that the sale was by order of his assignee. Evidence was also given to show that the plaintiff had bought the furniture at this sale, and had paid the price of it. It further appeared, that, down to the time of the execution being put in, the furniture remained in the possession of Botwood, who was not called as a witness for the plaintiff.

Greaves, for the defendant, proposed to ask a witness for the plaintiff, whether, at the time when the sheriff's officer went to seize the goods under the writ of *fi. facias*, Botwood did not say that the goods were his son's.

*94] *WIGHTMAN, J.—I think the evidence is not admissible.

Greaves and *Keating*, for the defendant.—This is like the case of a bankrupt, where declarations after an act of bankruptcy have been held admissible. So in the case of *Ivat v. Finch*, 1 Taunt. 142, (a) it was held,

(a) In that case, which was an action of trespass for taking three mares, in which the defendants justified under a heriot custom, and in which the only question between the parties was, whether one Alice Watson, the tenant, was possessed of the said mares at the time of her death, it was admitted they had formerly been her property; but it was contended, that, some time before her death, she had transferred them, with the rest of her farming stock, to the plaintiff. For the purpose of proving this transfer, a witness was called to speak to a conversation, in which Mrs. Watson had stated that she had retired from business, and had given up her farm and stock to her son-in-law, the plaintiff. Lord Ellenborough, C. J., inquired whether these declarations were accompanied by any act relative to the management of the farm; and this being answered in the negative, his lordship was of opinion that the evidence could not be received; but it was afterwards held by the Court of Common Pleas that the evidence ought to have been received; and Lord Chief Justice Mansfield, in delivering the judgment of the court, said, "The admission supposed to have been made by Mrs. Watson, was against her own interest. Had this been an action between Mrs. Watson and the present plaintiff, her acknowledgment that the property belonged to him might clearly have been given in evidence. It ought, therefore, to have been received in the present instance, because the right of the lord of the manor depended upon her title."

upon an issue, whether a party died possessed of a certain farming stock, that evidence might be given of a conversation, in which such party admitted that she had given up her farming stock to her son-in-law. In the present case, Botwood was in possession under the plaintiff, and, as the terms on which he was in possession are not shown, what Botwood said may be given in evidence.

WIGHTMAN, J.—I think the evidence is not admissible. In the cases referred to, the parties claimed under the *persons whose declarations were given in evidence. In this case the plaintiff claims adversely to Botwood. [*95]

The evidence was rejected.(a)

The jury found that the sale at auction was fraudulent, but found a verdict for the plaintiff; damages for the value of the casks.

Whateley and F. V. Lee, for the plaintiff.

Greaves and Keating, for the defendant.

(a) See the cases of *Prosser v. Gwillim*, post, p. 93, and *Stothert v. James*, post, p. 121.

HEREFORD ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE WIGHTMAN.(a)

PROSSER v. GWILLIM.

On the trial of an issue directed to try whether goods seized by the sheriff of H. under a *fi. fa.* against G. were the goods of the plaintiff, the plaintiff's counsel proposed to give evidence of a statement made by G., before the execution went in, that he (G.) was indebted to the plaintiff, and was going to assign his goods to him, by way of payment:—*Held*, that this evidence was not receivable.

Issue directed by the Court of Exchequer, to try whether certain goods, which had been seized by the sheriff of Herefordshire under a writ of *fi. fa.* sued out against William Gwillim, were the goods of the plaintiff.

On the part of the plaintiff, a witness was called, who *proved that William Gwillim, before the execution was sued out, had fetched him to his house to witness the execution of an assignment of these goods to the plaintiff. [*96]

Greaves, for the plaintiff, proposed to show, by the evidence of this witness, that, as the witness was then going with William Gwillim to the house of the latter, he was told by William Gwillim, that he (William Gwillim) was indebted to the plaintiff, and was going to assign his goods to him by way of payment.

Whateley, for the defendant.—I submit that what William Gwillim has said is no evidence against the present defendant.

Greaves.—This declaration of William Gwillim was made before the assignment to the plaintiff, which distinguishes this case from that of *Roberts v. Justice* (b) and I also submit that a declaration made by a person

(a) Mr. Justice Erskine was not at either the Shrewsbury or the Hereford Assizes, being detained at Stafford by the trial of the case of *Regina v. Cooper*, (one of the Chartist's,) which trial occupied eleven days.

(b) *Arté*, p. 93, and see also the case of *Stothert v. James*, post, p. 121.

in possession of goods or land, before an assignment or sale, is receivable in evidence, although a declaration after an assignment or sale is not receivable.

WIGHTMAN, J.—I think the evidence is inadmissible. The execution creditor does not claim the goods under William Gwillim, but adversely to him. The evidence was rejected. Verdict for the defendant.

Greaves, and W. H. Cooke, for the plaintiff.

Whateley, and Venables, for the defendant.

*97]

*MONMOUTH ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE PATTESON.

REGINA v. ELIZA ANN DENT.(a)

On an indictment for bigamy, it is not essential that a witness, who is called to prove the law of Scotland as to marriage, should be at all connected with the legal profession; and the evidence of a gentleman, who stated that he was born and educated in Scotland, and lived there till he was twenty years old, and that he was acquainted with the law of marriage in Scotland, was held to be sufficient for this purpose.

BIGAMY.—This prisoner was indicted for bigamy, in having married Richard Stanley Wall—her former husband, Edward Dent, being then alive.

The marriage of the prisoner with Edward Dent, at Monmouth, on the 1st of January, 1840, and her marriage with Richard Stanley Wall, before the registrar of St. Pancras, Middlesex, on the 4th of July, 1842, were proved; and it was also proved that Edward Dent was alive.

It was opened by F. V. Lee, for the defence, that the marriage of the prisoner with Edward Dent was invalid, as Edward Dent had, in the year 1828, married Mary Anne Bruce, who was still alive.

It was proved by Mary Anne Barclay, that, in the year 1828, she was present at the marriage of Edward Dent and Mary Anne Bruce, at Leith, that marriage being by a minister of the Scottish church, at his house.

To prove the law of Scotland on the subject of marriage, Mr. Gibbon was called. He said, "I reside at Staunton, near Monmouth. I live on my property. I was born and educated in Scotland, and lived there till I was twenty years old. I am acquainted with the law of marriage in Scotland. Marriages are of two sorts in that country—regular and clandestine, but both are equally lawful: the first is performed by a clergyman of the *98] established church of Scotland; the other is, where the parties acknowledge themselves as man and wife in the presence of witnesses." In his cross-examination, Mr. Gibbon said, "I never heard of marriages performed in the Kirk. There is no certificate required, and no writing whatever. I have been at many marriages, and never heard of any certificate being given or asked for."

Greaves, for the prosecution.—I submit that Mr. Gibbon not being at all

(a) This case was expressly overruled in the *Sussex Peerage case*, 11 Cl. & Fin. 85, 134, and it was there held by the House of Lords, that a witness to foreign law must be a person *peritus virtute officii* or *virtute professionis*. A Roman Catholic bishop holding in this country the office of coadjutor to a Vicar Apostolic, and, as such, authorized to decide on cases arising out of marriages affected by the law of Rome, was therefore held in virtue of his office to be a witness admissible to prove the law of Rome as to marriages. In the same case it was held, that a professional or official witness, giving evidence as to foreign law, may refer to foreign law-books to refresh his memory, or to correct or confirm his opinion, but the law itself must be taken from his evidence.

connected with the legal profession in Scotland, his evidence is not sufficient to prove the law of Scotland.

F. V. Lee.—I submit that it is not essential that a person should be a lawyer, in order to state what the law of another country is. If his evidence is such as to satisfy the learned judge that he possesses sufficient skill and knowledge of the law of the country, respecting which he deposes, that is sufficient.

WIGHTMAN, J.—I am quite satisfied with the evidence of Mr. Gibbon, and I am of opinion, that, according to the law of Scotland, the marriage of Edward Dent and Mary Anne Bruce was valid, and that the marriage of Edward Dent with the prisoner was therefore void. The prisoner must, therefore, be acquitted.

Verdict—Not guilty.

Greaves, for the prosecution.

F. V. Lee, for the prisoner.

*GLOUCESTER ASSIZES.

[*99

(Civil Side.)

BEFORE MR. JUSTICE ERSKINE.

STOCKER and Another v. RODGERS and Another.

If, in an action for the infringement of a patent, the defendant plead not guilty, that the invention was not new, and that the specification is not sufficient; and the defendant at the trial consent to a verdict for the plaintiff, without any evidence being given, the judge will not certify, under the stat. 5 & 6 Will. 4, c. 83, s. 3, "that the validity of the patent came in question before him."

CASE for infringing a patent for "certain improvements in straps for wearing apparel."—Plea: first, not guilty; second, that the alleged invention was not new; third, that the specification did not particularly describe the invention, and in what manner it is to be performed. Replication to the first plea, a similitur; to the second plea, that the alleged invention was new; and to the third plea, that the specification did particularly describe the invention, and in what manner it was to be performed.

Before any evidence was adduced for the plaintiff, *Whateley*, for the defendant, stated, that he had no defence to the present action, and that he would consent to a verdict for 40s. damages.

This proposal was assented to by *R. V. Richards*, for the plaintiff.

Verdict for the plaintiff; damages, 40s.

R. V. Richards applied to the learned judge for a certificate, under the 3d section of the stat. 5 & 6 Will. 4, c. 83, (a) that the validity of the patent came in question.

Whateley, for the defendant.—I do not object to that.

ERSKINE, J.—I think that, as this is a verdict by consent, and as no evidence has been adduced before me, I ought not to grant a certificate. My certificate would affect third parties; and it would be [*100

(a) Set out in 9 C. & P. 336, n. (a).

possible, in a case like the present, for two parties, by collusion, to consent to a verdict in favour of a patent, and, if they could obtain a certificate under the third section of the statute, to use it afterwards to the injury of another party who was really contesting the validity of the patent.

Certificate refused. (a)

R. V. Richards and *A. M. Skinner*, for the plaintiff.

Whateley, for the defendant.

(a) See the case of *Gillett v. Wilby*, 9 C. & P. 334.

MASON v. BARKER, Esq.

If a magistrate commits a person to prison in a case in which he has no jurisdiction, he is liable for all the circumstances that usually attend the execution of a warrant of commitment, such as the party being handcuffed, having his hair cut short at the prison, and his being put in a bath there; but not for any violence or excess of the officers.

If a party is taken into custody by a constable, on a warrant, the signature of which is proved to be of the handwriting of the defendant, a magistrate, this is *prima facie* evidence against the defendant in an action for false imprisonment, without further proof that the warrant was issued by him.

A party, in a notice of action, may describe himself by the addition of what he really is, e. g. "dealer," although in the commitment he is described as a labourer.

The provisions of the stat. 52 G. 3, c. 93, that convictions for sporting without game certificates shall be entered and registered with the commissioners of taxes of the district, and returned to the clerk of the peace, are directory only; and where this has been omitted, the conviction is not therefore void; but the convicting magistrate may be liable to punishment for not complying with the directions of the statute.

Seem, that a commitment which recites a conviction by which the plaintiff was adjudged to forfeit £20, which is mitigated to 19l. 10s., and 10s. added for costs, is supported by proof of a conviction in a penalty of £20, from which the magistrate orders 10s. costs to be deducted.

Where, in a conviction, the summons is recited, such recital of it is evidence of the summons; but in an action against the convicting magistrate for false imprisonment, the plaintiff may show that there was no summons, and if he does so, the conviction is bad.

Whether a conviction, drawn up in a form given by statute, not reciting the summons, is *prima facie* evidence of the summons, query.

Where a party is committed for non-payment of a penalty, in a case where the magistrate has no jurisdiction, and, after a part of the imprisonment, he is discharged on the penalty being paid, the jury may, in an action for false imprisonment against the magistrate, include the amount of the penalty in the damages, if they are satisfied that the plaintiff paid it, or that it was paid in such a way that the plaintiff was liable to repay the amount to the person who actually advanced the money.

FALSE imprisonment; it being alleged in the declaration as special damage, that the plaintiff was obliged to "pay a sum of £20 to obtain his discharge.—Plea, not guilty "by statute."

It was opened by *Talfourd*, Serjt., for the plaintiff, that on Saturday, the 30th of July, 1842, the plaintiff was apprehended by a policeman at Fairford, who told him he must be taken to Northleach prison unless he paid £20, this having reference to a complaint made about four years before, that the plaintiff had shot a hare without having taken out a game certificate. Upon this the plaintiff was handcuffed, and taken to the prison at Northleach, where he had his hair cut close, and he was put into water; and was there detained till the following Monday, when he was discharged on the £20 being paid. This was done under a warrant of the defendant, dated the 29th of May, 1838, the plaintiff having (as he was instructed) been convicted, if he was convicted at all, without any summons.

The notice of action was put in. It was in the same form as a declaration for false imprisonment, (a) but stating the imprisonment to have occurred at Fairford, Bibury, and Northleach. (b) It commenced—"I, Thomas Mason, of Fairford, in the county of Gloucester, *dealer*, do hereby, according to the form of the statute in such case made and provided, give you notice," &c.

Mr. Townsend, the governor of the prison at Northleach, produced the warrant for the commitment of the plaintiff, which was signed by the defendant, on which the plaintiff was imprisoned.

*It was in the following form:—

[*102

County of Gloucester, } To the constable of Fairford, in the said county, and to the
to wit. } keeper of the house of correction at Northleach, in the said
county.

Whereas, Thomas Mason, the younger, of Fairford, in the said county, labourer, was, on the 29th day of May, in the year of our Lord, 1838, convicted before me, John Raymond Barker, esquire, one of her Majesty's justices of the peace for the said county, and also one of the commissioners for executing an act made and passed in the 52d year of the reign of his late Majesty King George the Third, intitled "An Act for granting to his Majesty certain new and additional duties of assessed taxes, and for consolidating the same with the former duties of assessed taxes," appointed to act as such commissioner in the division of Bibury, upon the oath of Joseph Hicks, a credible witness, for that he, the said Thomas Mason, on the 24th day of May, in the year aforesaid, at Kempsford, in the said county, did unlawfully use a certain gun for the purpose of killing and taking game, and did take and kill one hare, without having such certificate as is required by law for that purpose, by virtue whereof he, the said Thomas Mason, hath forfeited the sum of £20, which was mitigated by me to the sum of 19l. 10s., besides the costs. And whereas it appears to the satisfaction of me, the said justice, that the said Thomas Mason hath not goods and chattels within my jurisdiction sufficient whereon to levy the said penalty.

These are therefore to command you, the said constable of Fairford aforesaid, to apprehend the body of the said Thomas Mason, and him safely to convey to the house of correction at Northleach, in the said county, and there deliver him to the said keeper thereof, with this precept.

And I do hereby command you, the said keeper of the said house of correction, to receive into your custody, in the said house of correction, the said Thomas Mason, and him there safely to keep for the space of six calendar months, unless the said mitigated penalty, together with 10s. for costs of the said proceedings and conviction, shall be sooner paid; and for so doing this shall be your sufficient warrant.

Given under my hand and seal the 29th day of May, in the year of our Lord 1838.

(Signed)

J. RAYMOND BARKER, [L. S.]

On the part of the plaintiff, a policeman, named Thomas Watson, was called. He said—"On the 26th or the 27th of July, 1842, I received this warrant from Mr. White, the clerk of the magistrates at Fairford. When I received the warrant the plaintiff was residing at Fairford. He had a horse and cart, sold green grocery, and was dealing there.

*On the 30th of July, 1842, between seven and eight o'clock in the evening, I took the plaintiff into custody at Fairford. I put handcuffs on him, and sent him to Northleach. [*103

R. V. Richards, for the defendant.—I submit that the defendant, as a magistrate, cannot be liable for the plaintiff being handcuffed by the constable.

ERSKINE, J.—If the whole proceedings are invalid, the magistrate is liable for all those circumstances that usually attend the execution of a warrant, but not for any violence or excess on the part of the officers.

(a) A notice of action in the same form as a declaration in trespass was held good by the Court of Exchequer, in the case of *Gimbert v. Coyney*, *McClie & Young*, 469.

(b) In the case of *Martins v. Upcher*, 2 G. & D. 716, it was held that, in a notice of action for false imprisonment, the place where the imprisonment occurred must be stated.

The witness Watson, in his cross-examination, said—"The plaintiff asked me if there was any thing against any other person for the same offence. He said that the keeper came up when he fired the gun off, and the keeper and he had a smartish tussle, and that while he had hold of the keeper, Merrett came up and took away the hare. He also told me, that he had gone off, and never knew a summons to be served. He told me that the hare was killed in Kempsford, in the Bibury district. He asked me who lodged the information against him, and I told him Joseph Hinks, the Rev. Mr. Huntingford's coachman. The plaintiff's father lives at Fairford. I do not know his name."

It was proved by Mr. Townsend, and a turnkey at Northleach named Harding, that the plaintiff was washed in a warm bath at that prison, and had his hair cut close; and that it was the usual practice to bathe persons brought there, and to cut their hair, and that the plaintiff was brought to the Northleach prison, on Sunday, the 31st of July, at about nine o'clock in the morning, and was discharged at twelve on the following day, when the plaintiff's wife brought a paper, (which was not given in evidence,) in consequence of which the plaintiff was discharged.

*104] It was proved by a policeman named Large, that he received the plaintiff from the other policeman, and took him to Bibury, on his way to Northleach. In his cross-examination this witness said—"The plaintiff told me that he and the keeper had fought a bit, and that he got away; and he told me that he had been away for four years;" and in re-examination he stated, that the plaintiff, in the same conversation, said he had not been served with any summons.

R. V. Richards, for the defendant.—I submit that the plaintiff must be nonsuited. There is nothing to show that Mr. Barker was any party to this transaction. There is nothing to affect Mr. Barker but his signature to the warrant. The plaintiff must go further to implicate Mr. Barker. Suppose that Mr. Barker put his name to the warrant, not intending to have it executed, and that Mr. White found it, and gave it to the constable.

ERSKINE, J.—The warrant being in the hands of the constable, signed by the defendant, is *prima facie* evidence that the defendant issued it.

R. V. Richards.—If there is a good warrant, the law will presume a good conviction.

ERSKINE, J.—That is so as regards the constable, but not so as to the magistrate. A good warrant is a sufficient protection to the officer, but no protection to the justice.

R. V. Richards.—There is a defect in the notice of action. The policeman says, that the plaintiff has a father living at Fairford, and the plaintiff should be described as "the younger," as he is in the commitment. (a)

**ERSKINE, J.*—There is no evidence of the father's name.

*105] *R. V. Richards*.—The plaintiff is described in the notice as a dealer, and in the commitment as a labourer.

Greaves, on the same side.—The notice of action ought to follow the

(a) In the case of *Rex v. Pearce*, 3 B. & A. 579, it was held, that upon an indictment for an assault upon "Elizabeth Edwards," it was sufficient to prove that an assault was committed upon a person bearing that name, although it appeared that there were two persons of that name, who were mother and daughter, and that the assault was committed upon the daughter. The objection there was, that the proof varied from the indictment, inasmuch as "Elizabeth Edwards" must be presumed to be Elizabeth Edwards the elder; but that objection was overruled both by Mr. Justice Holroyd at the trial, and afterwards by the Court of King's Bench.

description in the commitment. Mr. Barker never knew the plaintiff as a dealer.

ERSKINE, J.—You shall have the benefit of these objections, if there is any thing in them; but I think there is nothing in them. In the notice the plaintiff is correctly described as a dealer, as he was so.

R. V. Richards addressed the jury for the defendant, and proposed to put in the conviction of the plaintiff, the defendant's handwriting of the signature of it being proved.

The conviction was in the following form :—

County of Gloucester, } Be it remembered, that, on the 29th day of May, in the year
to wit. } of our Lord, 1838, at Fairford, in the said county of Gloucester,
Thomas Mason, of Fairford, in the said county, labourer, was duly convicted by me,
John Raymond Barker, esquire, one of her Majesty's justices of the peace of and
for the said county, and also one of the commissioners for executing a certain statute
passed in the 52d year of the reign of his Majesty King George the Third, intituled,
"An Act for granting to his Majesty certain new and additional duties of assessed taxes,
and for consolidating the same with the former duties of assessed taxes," and the
several other acts relating to the said duties of assessed taxes, appointed to act as such
commissioner in the district of Bibury, in the said county, for that he, the said Thomas
Mason, heretofore, and within three calendar months next before the making of this
conviction and the information on which the same was founded, to wit, on the 24th day
of May aforesaid, in the year aforesaid, at Kempsford, in the district and county
aforesaid, unlawfully did use a *certain gun, for the purpose of then and there [*106
taking and killing game, to wit, a hare, without having obtained such certificate
as is directed by the statute in that case made and provided, in order to an assessment for
the year wherein the said Thomas Mason did so use such gun, and did so kill such hare as
aforesaid, contrary to the form of the statute in that case made and provided, and was
adjudged to pay the sum of £20 for his said offence. And inasmuch as the said
penalty exceeded the sum of £5, l, the said John Raymond Barker, so being such justice
as aforesaid, according to my discretion, did then and there adjudge the sum of 10s.
for costs, to be deducted out of the said penalty, in case the said penalty was paid by
the said Thomas Mason, the said deduction not exceeding one-fifth part of the said
penalty, according to the form of the statute in that case made and provided: and in de-
fault of payment of the said penalty, and in case sufficient cattle, goods, or chattels of
the said Thomas Mason could not be found to satisfy the said penalty, together with the
reasonable costs and charges attending the same, as directed by the statute in that case
made and provided, l, the said John Raymond Barker, so being such justice and com-
missioner as aforesaid, did then and there adjudge the said Thomas Mason to be com-
mitted to the house of correction at Northleach, in the said county, there to remain for
the space of six months, unless the said penalty should be sooner paid.

Given under the hand and seal of me, the said John Raymond Barker, so being such
justice as aforesaid, and such commissioner acting in the execution of the acts relating
to the assessed taxes for the said district of Bibury aforesaid.

(Signed)

J. RAYMOND BARKER, (L. S.)

Talfourd, Serjt.—I submit that this conviction cannot be read in evi-
dence: 1st, because Mr. Barker could have no jurisdiction at all, unless
he was a commissioner for the district of Bibury, which is not shown; and
2d, because there is no evidence that this conviction has been entered and
registered in the books of the commissioners of taxes of the district, nor
returned to the clerk of the peace under the 15th rule in the stat. 52 Geo.
3, c. 93, Sch. (L).

ERSKINE, J.—Is that more than directory?

Talfourd, Serjt.—It cannot be sufficient to produce a piece of parchment
under the defendant's seal. It is not shown that the defendant was a com-
missioner; and the stat. 52 Geo. 3, c. 93, requiring the conviction to be
registered, distinguishes this from the ordinary cases.

*ERSKINE, J.—There is a distinction between a warrant and a [*107
conviction. The conviction may be drawn up at any time, but the
warrant must be drawn up before the arrest takes place. I shall receive

the conviction in evidence. I apprehend that the 15th rule in the stat. 53 Geo. 3, c. 93, Sch. (L), is directory. It does not enact that the conviction shall be void if its provisions are not complied with. The magistrate might be liable to be punished for not conforming to the directions contained in the act, but still the conviction be good.

The conviction was read.

Talfourd, Serjt.—The conviction does not authorize the issuing of this warrant. By the conviction the plaintiff is convicted in a penalty of £20., and the magistrate adjudges 10s. for costs to be deducted from the penalty, as not exceeding one-fifth of it. The warrant recites a conviction, by which the plaintiff forfeited £20., which is mitigated to 19l. 10s., and a sum of 10s. is added for costs.

ERSKINE, J.—Is it not the same in effect? The commitment must, in substance, follow the conviction, and, if the plaintiff pays £20, he is to be discharged.

Talfourd, Serjt.—This conviction is no evidence that any summons was ever served. It does not state the service of any summons, or even the issuing of one. (a)

*108] *R. V. Richards*.—The stat. 52 Geo. 3, c. 93, has given a form for the conviction, which has been followed, and that form is equivalent to a conviction reciting a summons.

Greaves.—The statutes which give forms of conviction were passed for the purpose of facilitating the framing of convictions, and for the better protection of magistrates. Now, if it were held, that, where a conviction is drawn up in the form given by a statute, the preliminary proceedings must be proved, instead of such forms affording a better protection to magistrates, the magistrates would be placed in a worse situation than they were in before. Besides, if the summons is to be proved, by the same reason the information must be proved, and all the other proceedings; the consequence of which would be, that, instead of the conviction being conclusive evidence in favour of the magistrate, which it is according to all the authorities, every fact must be proved before the jury.

ERSKINE, J.—There is a case of *Dingsdale v. Clarke*, where the Court of King's Bench held, that where the statute prescribed a summary form

(a) In the case of *Rex v. Hall*, 6 D. & R. 84, the defendant had been convicted by default on the stat. 5 Ann. c. 14, for killing game. The conviction was removed into the Court of King's Bench by certiorari, and Mr. Carter moved that it should be quashed, "for not showing on the face of it, that the defendant had been served personally with the summons to appear to the information." Mr. (afterwards Mr. Justice) Taunton, contrâ, "contended that personal service of the summons was unnecessary, and clearly need not be stated on the record. Here the record stated that the defendant had been 'duly summoned,' which imported all reasonable circumstances; and the court would intend a personal service to have taken place if that were necessary." Lord Chief Justice Abbott said, "Without giving any opinion that a personal service in all cases is absolutely necessary, it is sufficient to say, that in this case no sufficient substantial personal service appears to have taken place, and therefore the conviction must be quashed." And Mr. Justice Bayley said, "It is consistent with every analogy, that a person shall not be concluded without personal service of the process which is to affect his liberty. It is laid down in Burn, Boscawen, and Nares, and other text books, that personal service of the summons is necessary, unless where it is expressly dispensed with by statute. Of this opinion was Lord C. J. Parker, in *Rex v. Simpson*," 12 Mod. 345, "If the defendant appears and makes a defence, it must be taken that he was duly summoned; but if the conviction is by default, it must be clearly shown on the face of the record, that he had been personally served, and had an opportunity of being heard." "I think this conviction must be quashed, for not showing that the defendant was personally summoned." Mr. Justice Holroyd and Mr. Justice Littledale concurred, and the conviction was quashed.

of conviction, reciting that the party had been duly convicted, it was sufficient *for the magistrate to prove the recorded conviction, without proof of any previous steps. [*109]

Greaves.—That case is reported in 2 Starkie on Evidence, 430, 2d ed.; 590, 3d ed.

ERSKINE, J.—I think that the best course will be, to hold that the previous proceedings ought to be proved, and to give the defendant leave to move to enter a nonsuit, or a verdict for him, if the court should be of opinion that the previous proceedings need not be proved, as that course will prevent the expense of a new trial.

Talfourd, Serjt., in reply.—It is quite clear that no summons was served on the plaintiff, because he asks one of the policemen whether any one else is included in the charge, and who is the informer, all of which he would have known if he had been summoned; and the bona fides of the plaintiff cannot be doubted as to what he then stated, as he at the same time made a very ample confession as to shooting the hare, of which the defendant has had the full benefit. And, with respect to the damages, I submit that he is entitled to have the £20 included in them, as it is for you to say whether he got discharged without that sum having been paid: and I submit that he is entitled to a compensation for being put under prison discipline, for which Mr. Barker is responsible, as those were all the natural consequences of his act in granting the warrant.

ERSKINE, J., (in summing up.)—The plaintiff complains that he has been wrongfully imprisoned, and the defendant, by his plea, puts in issue the right of the plaintiff to maintain this action. It was suggested that there was no evidence that the defendant had ever put the warrant in operation; you are to say whether, from the fact of the warrant bearing the signature of the magistrate, and being *placed in the hands of the constable by the clerk of the magistrates, you are satisfied that it was issued by the defendant. If you are satisfied that it was issued by the defendant, the plaintiff would be entitled to recover, unless the defendant could show that the warrant was issued under such circumstances as would justify it. A conviction has been put in for the purpose of showing that the defendant had jurisdiction; and I thought it much better not to stop the case, that the question, whether the conviction was sufficient, should be decided by the court above; and, if they are of opinion that the conviction is good, the verdict will do no injury to the defendant. This conviction is in the summary form, and not reciting either the summons or the information. Where, in a conviction, the summons is recited, the mere recital is evidence of the summons; but even if this conviction had recited the summons, it would have been open to the plaintiff to have shown that there was no summons, and then there would be no good conviction; for if no summons was served in this case, the whole proceedings are bad. There is no distinct evidence adduced before you to show either that a summons was served, or that no summons was served, but there is a statement made by the plaintiff while he was in custody. Now, it does not follow, that, because a party makes a statement, and is entitled to have the whole of a conversation given in evidence, that you are to take the whole of it to be true. Still it must be taken into consideration, and it appears that the plaintiff stated that he had not been served with any summons; and the only circumstance tending to corroborate that statement is the fact, that he went away immediately after. You will say whether, taking all the circumstances into your consideration, you are satisfied that, in point of

fact, no summons was served. The only other question is the amount of the damages. It appears that the plaintiff was handcuffed, and was afterwards put into a warm bath, and had his hair cut close; and it was objected that the defendant was not at all liable for any of those things, because -111] there was *no proof that he had directed them to be done; but if a magistrate puts a warrant in execution, he is supposed to authorize all persons to take all those steps which are ordinarily taken on such occasions; and it is proved, that the same course was adopted in this as in other cases, and, therefore, the magistrate must be taken to have authorized all that was ordinarily done, and that might be reasonably expected to be done. Therefore, if cutting the hair close was to be reasonably expected as a consequence of the plaintiff being taken on this warrant, the magistrate is answerable for it. You are to say, therefore, what damages the plaintiff is entitled to, taking it that he has been improperly convicted. With respect to the £20, if you are satisfied that the plaintiff paid it, or that it was paid in such a way that he was liable to repay the amount to the person who actually advanced the money, you ought to take that into account in awarding damages. There is no direct evidence that the £20 was paid by the plaintiff, or by any one; but it is proved that his wife brought a paper, and we do not know what that paper was, but we find that the plaintiff, who was committed for six months, gets out of custody, in two days, on this paper. If, on this evidence, you are satisfied that the plaintiff paid the £20, or made himself liable for it, you will include that sum in the amount of your verdict. *Qui facit per alium facit per se*; and payment by another for me, is payment by me.

Verdict for the plaintiff, the foreman of the special jury adding,
 “We find that the summons was not served, and that the damages are £20, plus £5.”^(a)

Talfourd, Serjt., and *Carrington*, for the plaintiff.

R. V. Richards, *Greaves*, and *W. Cripps*, for the defendant.

(a) No motion was made in the court above, either for a nonsuit or a new trial.

*112]

*(*Crown Side.*)

BEFORE MR. JUSTICE WIGHTMAN.

REGINA v. THOMAS PHILPOTTS.

An indictment for obtaining money by false pretences, charged that the defendant unlawfully did falsely pretend to C. S., that a certain paper writing which he produced to C. S. was a good five pounds Ledbury Bank note; by means whereof he unlawfully obtained money from C. S., with intent to cheat and defraud him of the same; whereas, in truth and in fact, the paper writing was not a good five pounds note of the Ledbury Bank:—*Held*, that the indictment was bad, as it did not charge that the defendant *knew*, that it was not a good five pounds note of the Ledbury Bank, and that this was not aided by the allegation of the intent to defraud.

FALSE pretences.—The first count of the indictment charged, that the defendant, on the 26th day of March, 6 Vict., at Newent, “unlawfully did falsely pretend to one Charles Sterry, that a certain paper writing which he, the said T. P., then and there produced and delivered to the said C. S., and which said paper writing was and is as follows, that is to say:

"Folio
15610.

"London Friendly Union,
71, Leadenhall-street.

"Established for the encouragement of trade, and to give employment to industrious artisans.

"Received of ——— Two Shillings and Sixpence, the December Quarter's Subscription to this Institution. 1842.

"£0 2 6

"Treasurer, W. J. THURNELL."

"No information will be given without the production of the receipt."

was a good five pounds Ledbury Bank note; by means of which said false pretence the said T. P. did then and there unlawfully obtain from the said C. S. three pieces of the current gold coin of the realm called sovereigns, two pieces of the current silver coin of the realm called shillings, of the moneys of him the said C. S., with intent to cheat and defraud him, the said C. S., of the same: Whereas, in truth and in fact, the said paper writing was not a good five pounds Ledbury Bank note, and whereas in truth and in fact the said paper writing was not a bank note for the payment of any money whatever, and was of no value whatever." To the great damage and deception, &c., and against the form of the statute, &c. [*113]

The second, third, and fourth counts were similar to the first, except that in the second count the false pretence was charged to be, that the paper writing "was a good five pounds note of the Ledbury Old Bank." And in the third count, that the paper writing "was a good and genuine five pounds note." And in the fourth count, that the paper writing "was a good and genuine note for the payment of five pounds, and of the value of five pounds." In each of these latter counts, the false pretence therein stated was negatived; but it was not alleged in either of the counts of the indictment, that the defendant *knew* that the paper writing was not a five pounds note.

When the defendant was called on to plead, *Greaves*, for the defendant, moved that the indictment should be quashed, on the ground that it did not show that the prisoner *knew* that the instrument was not what he represented it to be. He cited the case of *Regina v. Henderson*, Car. & M. 328, (a) and submitted that that was a stronger case than the present, as there at least one of the defendants must have known whether he was possessed of the money or not.

*WIGHTMAN, J.—I shall not quash the indictment, as the defendant may demur. [*114]

Greaves, for the defendant, declined to demur, (b) and the defendant pleaded not guilty.

(a) In that case an indictment for false pretences against Robert Henderson and Jeremiah Barlow charged that Francis Pawson was possessed of a mare and Henderson of a horse, and that Henderson and Barlow falsely pretended to Francis Pawson that Barlow "was then and there possessed of a certain sum of money, to wit, £12;" and that, if Francis Pawson would exchange his mare for Henderson's horse, Barlow was ready and willing to purchase the horse of Francis Pawson, and give him £12 for it, "whereas, in truth and in fact, the said Jeremiah Barlow was not then and there possessed of the said sum of £12," and was not then and there ready and willing to purchase the said horse; and it was held by the fifteen judges that the indictment was bad, as it did not aver that the defendants *knew* that Barlow was not possessed of £12.

(b) If a party demurs to an indictment for a misdemeanor, and judgment is given

On the next day, WIGHTMAN, J., said that he had a strong opinion that the indictment was bad.

Keating, for the prosecution.—As the defendant has pleaded, he cannot avail himself of the objection, if this supposed defect would be aided after verdict; (a) and I submit, that this indictment will be at all events good after verdict, as it pursues the terms of the statute 7 & 8 Geo. 4, c. 29, s. 53, which omits the word “knowingly,” which was contained in the earlier statute, 30 Geo. 2, c. 24, which is now repealed; and it could not be that the defendant intended to defraud, unless he knew that the instrument was not what he represented it to be.

Greaves.—The false pretences must be well stated; and if they are not, the allegation of intent will not aid the defect.

WIGHTMAN, J.—I think that this indictment is bad. The jury might find the defendant guilty on this indictment, although it was not proved that the defendant knew that the instrument was not such as he stated it to be; and as the prosecutor was deceived by the instrument, so might *115] *the defendant be, and the defect is not aided by the statement of the intent.

The defendant, by leave of the court, withdrew his plea, and the indictment was quashed.

Keating, for the prosecution.

Greaves, for the defendant.

against him, the judgment is final; and not that he should answer over, as it is on a demurrer to an indictment for felony. (*Rex v. Josiah Taylor*, 5 D. & R. 422; *Reg. v. Phelps*, Carr. & M. 181; *Reg. v. Purchase*, Id. 617; and *Reg. v. Adams*, Id. 299.)

(a) In the case of *Reg. v. Ellis*, Carr. & M. 564, Mr. Justice Patteson said, that “a party who has not demurred [to an indictment] cannot after plea take any objection to any matter on the record, which is aided by verdict,” under the 21st section of the statute of 7 Geo. 4, c. 64.

OXFORD SUMMER CIRCUIT, 1843.

BEFORE MR. JUSTICE WILLIAMS AND MR. JUSTICE MAULE.

BERKSHIRE ASSIZES.

BEFORE MR. JUSTICE WILLIAMS.

REGINA v. FELLOWES.

An indictment for perjury alleged to have been committed on the trial of an action of debt, brought and tried in a county court, stated, in the first count, that the county court was holden before H. M. B., Esq., the high sheriff, and the oath sworn before him; in the second count that the county court was holden before C. J. B., gent., the county clerk, and the oath sworn before him; and in the third count that the county court was held before C. J. B., gent., the county clerk, and the suitors, [naming them,] and the oath sworn before C. J. B., “so being such county clerk as aforesaid, and T. J., &c. [naming them] suitors of the said court of the said sheriff as aforesaid:”—*Held*, bad, as the county court was misdescribed in each of the counts, and that the fact of the county clerk being also a freeholder of the county made no difference.

PERJURY.—The first count of the indictment charged that heretofore, to wit, at the county court of Henry Mill Burnaby, Esquire, sheriff of the county of Berks, holden at Newbury, in and for the said county, *before* [*116 *the said H. M. B., Esquire, then being sheriff of the said county as aforesaid, a certain issue between one Richard Stapleton and James Eldridge, in a certain action of debt, came on to be tried in due form of law, and was then and there tried by a jury of the county, in that behalf duly sworn,* &c.; and that the defendant “appeared as a witness for and on the behalf of the said R. S., the plaintiff in the action aforesaid, and was then and there duly sworn, and took his corporal oath upon the holy Gospel of God, *before the said H. M. B., Esquire, he being such sheriff as aforesaid.*” It then went on to aver, that “he, the said H. M. B., Esquire, sheriff as aforesaid,” had authority to administer the oath, and set out the evidence of the defendant, and assigned perjury upon it.

The second count stated, “that heretofore, to wit, at the county court of H. M. B., Esq., sheriff of the county of Berks, holden at Newbury, in and for the said county, on the 7th day of February, 1842, *before Charles James Barnes, gentleman, county clerk of the said sheriff of the county of Berks, a certain issue,*” &c., [as in the first count,] came on to be tried, and that the defendant appeared as a witness, and was sworn, “before the said C. J. B., gentleman, so being such county clerk as aforesaid;” but this count was, in all other respects, similar to the first count.

The third count stated, that “heretofore, to wit, at the county court of H. M. B., Esq., the sheriff of the county of Berks, holden at Newbury, in and for the said county, on the 7th day of February, 1842, *before Charles James Barnes, gentleman, county clerk of the court of the said sheriff of Berks, and Thomas Joyce, James Dredge, Richard Dredge, and Daniel Dredge, suitors of the court of the said sheriff, a certain issue* [as in the first count] came on to be tried, and that the defendant appeared as a witness, and was sworn, “before the said C. J. B., gentleman, *so being such county clerk as aforesaid, and T. J., J. D., R. D., and D. D., suitors of the said court of the said sheriff as aforesaid;*” but this count was, in all [*117 other respects, the same as the first count.

Carrington, for the defendant.—Before this case is gone into, I submit that this indictment cannot possibly be sustained, as the court in which the perjury is alleged to have been committed is misdescribed in every count in the indictment. The defendant gave his evidence on the trial of an action of debt, which was brought and tried in the county court of the sheriff of Berkshire. In the first count the oath is stated to have been taken before the high sheriff himself, which is just as improper as the stating that an oath made in the Court of Queen’s Bench was sworn before her Majesty. The second count states the court to have been holden before the county clerk, and the oath taken before him. This too, is improper, as the county court is not held before the county clerk, neither is he the sole judge of it; and the third count is equally objectionable, as that states the trial to have been had, and the oath taken, before the county clerk and the suitors jointly, which is not the way the county court of the sheriff is constituted, that being the court of the high sheriff, held before the suitors; and in the case of *Jones v. Jones*, 5 M. & W. 523,(a) it was de-

(a) In that case it was held, that a declaration on a judgment in a county court, stating the court to have been held before “*Thomas Pryce Lloyd, sheriff, and the suitors of the said court,*” was bad on special demurrer; two of the causes of demurrer being, that the county court must be held before the suitors, and not before the suitors

*118] cided, that a declaration on a judgment *in a county court was demurrable, if it stated the court to have been holden before the sheriff and the suitors, the county court being the court of the sheriff, holden before the suitors, and not before the suitors and any other person.

Selfe, for the prosecution.—I admit that I cannot support the first two counts of the indictment; but, with respect to the third, I submit that if the oath is charged to have been taken, on a trial before the suitors in the court of the sheriff, and proved to have been so, that will be sufficient; and that it being superfluously stated that the oath was also taken before some person who was not a component part of the court, will not be fatal to the prosecution; and I am also in a condition to prove that Mr. Barnes, the under-sheriff, who was also the county clerk, was in fact a freeholder in the county, and, therefore, qualified to act as one of the suitors.

Carrington.—The court, if it consisted, as the third count states that it did, of the county clerk and of the suitors, was improperly constituted. The fact of Mr. Barnes being a freeholder will not obviate the objection, because, in addition to its being stated in the indictment that the court was holden before Mr. Barnes, the county clerk, and the other gentlemen, as the suitors, it is alleged that the oath was taken not before them *all* as suitors, but before Mr. Barnes, “so being such county clerk as aforesaid,” and the other gentlemen, “suitors of the said court of the said sheriff as aforesaid.”

*119] WILLIAMS, J.—I am of opinion that this indictment *cannot be sustained. It is of the essence of the offence of perjury that the court before which it was committed should have been properly constituted. The defendant must be acquitted. Verdict—Not guilty.

J. Jefferys Williams, and *Selfe*, for the prosecution.

Carrington, for the defendant.

and sheriff, or any other person; and that the names of the suitors should have been stated. And Lord Abinger, C. B., said, “the words ‘before such and such persons,’ I think, necessarily imply that the cause was heard before the persons who were the lawfully constituted judges of the court. The words ‘before the sheriff and suitors’ therefore imply that the sheriff is a judge of the county court, which certainly is not the case. If the suitors were to differ in opinion, and the sheriff were to give a casting vote, and thereby decide the question, the judgment would be bad. Suppose a judgment recovered before the Court of Common Pleas were pleaded as a judgment recovered ‘before the justices of our lady the Queen of the Bench and the Lord High Chancellor,’ it would be error, and the latter part of the allegation could not be rejected as surplusage.” And Baron Parke said, “The old precedents all describe the court as the county court of the sheriff held before the suitors, and set out the names of the suitors.”

WORCESTER ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE WILLIAMS.

REGINA v. CHAPMAN.

It was the duty of a clerk to receive money for his employer, and pay wages out of it, and to make entries of all moneys received and paid in a book, and to enter the weekly totals of receipts and payments in another book, upon which last book he, from time to time, paid over his balances to his employer. The clerk having entries of weekly payments in his first book, amounting to £25, he entered them in the second book as £35; and, two months after, in accounting with his employer by these means, made his balance £10 too little, and paid it over accordingly:—*Held*, that the clerk could not, on these facts, be convicted of embezzlement without its being shown that he had received some particular sum on account of his employer, and had converted either the whole or part of that sum to his own use.

EMBEZZLEMENT.—The first count of the indictment charged that the prisoner, being the clerk of Francis Rufford, had, by virtue of his employment, received the sum of £10 (a) on account of his master, and had embezzled the same. There were other counts as to another sum of £10, and for larceny.

It was opened by *Whitmore*, for the prosecution, that *the prisoner [*120 was in the employment of the prosecutor as a clerk and traveller, and that his duty was to receive from the customers of the prosecutor moneys paid by them for goods supplied, and also to pay out of such moneys the wages and other outgoings of the establishment; the payments so made being entered in a small book kept by the prisoner, and their weekly total carried into a larger book, which showed the general debtor and creditor account between the prisoner and his master; and the balance shown in this last-mentioned account was, from time to time, struck, and sometimes paid over, and sometimes brought forward as the commencement of a new account. And in September, 1842, one of the weekly totals, as it appeared in the smaller book kept by the prisoner, showed an aggregate of payments to the amount of £25. In the account for that week it was entered in the larger book as £35, and this false entry appeared to have been written on an erasure. In the next month (October) a balance was struck on the general account, and the sum found to be due upon that balance was carried forward as the first item of a new account, which was settled in the following December, and the balance at that time paid over to the prosecutor, it being £10 less than it ought to have been, by reason of the sum of £35 being inserted as before mentioned, instead of £25.

WILLIAMS, J.—Can you show any precise sum received by the prisoner on account of his master, and the whole or part of that very sum appropriated by him to his own uses?

Whitmore.—There is no evidence at all of that kind.

WILLIAMS, J.—In the absence of such evidence, I think that the prosecution cannot be sustained.

*His lordship directed an acquittal.

Verdict—Not guilty.(b)

Whitmore, for the prosecution.

[*121

Allen and John Gray, for the prisoner.

(a) See the case of *Rex v. Creed*, ante, p. 63.

(b) See the case of *Regina v. Grove*, 7 C. & P. 635.

MONMOUTH ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE MAULE.

STOTHERT v. JAMES.

On the trial of an issue directed to try whether goods seized under a *fi. fa.* sued out against A., at the suit of the defendant, were the goods of the plaintiff, the declarations of A., as to the property of the goods, are not receivable in evidence on the part of the plaintiff.

Issue directed by the Court of Common Pleas to try whether five horses which had been seized by the sheriff of Monmouthshire, under a writ of *fi. facias*, sued out by the defendant against William Williams, were the property of the Blana Iron Company, of which company the plaintiff was a director.

F. V. Lee, for the plaintiff, proposed to ask a witness for the plaintiff as to what William Williams had said as to the property in these horses.

R. V. Richards, for the defendant.—I submit that what William Williams said is not receivable as evidence against the present defendant.

*122] **F. V. Lee*.—The defendant claims under him.

MAULE, J.—I think that is the fallacy. If these horses do not belong to this company, the defendant will succeed on this issue, whether they belong to William Williams or to any other person except the company. I think, therefore, that the evidence is not receivable.

The evidence was rejected. (a)

Verdict for the plaintiff.

F. V. Lee and *G. K. Richards*, for the plaintiff.

R. V. Richards and *Sir T. Phillips*, for the defendant.

(a) See the cases of *Roberts v. Justice*, *Esq.*, ante, p. 93, and *Prosser v. Gwillim*, ante, p. 95.

DOE on the demise of LEWIS v. LEWIS.

In ejectment where the lessor of the plaintiff claimed as heir of W. L., and the defendant claimed the *whole* property as devisee under the will of W. L., and *part* of it also under the marriage settlement made on her marriage with W. L.:—*Held*, that the defendant's admitting at the trial that the lessor of the plaintiff was the heir of W. L. did not entitle the defendant to begin; but that if the defendant had claimed title under the will only, and had admitted the title of the lessor of the plaintiff as heir, it would have been otherwise.

EJECTMENT to recover two farms and certain lands, situate in the parishes of New Church East and Shirenewton.

Talfourd, Serjt., for the defendant.—In this case the lessor of the plaintiff claims the property, as the heir of Mr. William Lewis, deceased, and the defendant, who is the widow of Mr. William Lewis, claims the whole of these farms and lands, as being devised to her by his will, by which he left her the whole of his property; a part of the farms and lands

*123] now in question being also limited to her by the marriage settlement made on her marriage with Mr. William Lewis. I therefore propose to admit the lessor of the plaintiff's pedigree and the defendant's possession, and to begin by going into the defendant's case.

R. V. Richards, for the plaintiff.—If the defendant relies on the will of Mr. William Lewis only, the defendant, on admitting the heir's title as such, is no doubt entitled to begin; but I submit that it is otherwise where the defendant relies on a will and some other title besides.

MAULE, J.—There was a case tried at Taunton before Baron BOLLAND,^(a) in which, in an ejectment by the heir against a party who claimed under a conveyance from the person from whom the heir derived title, it was held that the defendant's admitting the lessor of the plaintiff's title as heir did not give the defendant the right to begin.

**Talfourd*, Serjt.—If I admit the lessor of the plaintiff's prima facie case, the lessor of the plaintiff has nothing to do till I [^{*124} answer it.

MAULE, J.—I think that, as this is not a case in which the defendant relies on a will only, and as there are other defences, the defendant is not entitled to begin, although the defendant may be willing to admit that the plaintiff is the heir. I think, therefore, that Mr. Richards is entitled to begin.

R. V. Richards, for the lessor of the plaintiff, began.

Verdict for the defendant.

R. V. Richards, *W. J. Alexander*, and *F. V. Lee*, for the plaintiff.

Talfourd, Serjt., and *Keating*, for the defendant.

(a) The case of *Doe d. Tucker v. Tucker*, M. & M. 536. In that case the lessor of the plaintiff claimed as heir of John Tucker; the defendant claiming under a conveyance made by John Tucker. Scarlett, A. G., for the defendant, offered to admit the heirship of the lessor of the plaintiff, and claimed the right to begin; but Wilde, Serjt., for the plaintiff, contended, that, unless the defendant admitted that John Tucker died seised of the estate, the defendant did not admit the lessor of the plaintiff's whole title as heir, a part of which being that the ancestor died seised, and that, unless a defendant admitted the lessor of the plaintiff's whole title, he was not entitled to begin. Baron Bolland held, that Wilde, Serjt., for the lessor of the plaintiff, was entitled to begin, as the defendant did not admit the whole case of the plaintiff.

But, in the case of *Doe d. Smith v. Smart*, 1 M. & Rob. 476, which was tried before Baron Gurney at Salisbury, the lessor of the plaintiff claimed as heir-at-law of Mrs. Smith, and the defendant as devisee under Mrs. Smith's will; and it was held by Baron Gurney, after conferring with Patteson, J., that the defendant was entitled to begin, although it was stated by the counsel for the lessor of the plaintiff, that, as to part of the property, he intended to prove that the lessor of the plaintiff was assignee of the outstanding term: and Baron Gurney said, "The real question in dispute is the validity of this will. The mischief would be extremely great, if a party, by merely getting an outstanding term, should obtain an advantage to which he is not really entitled."

*SHROPSHIRE ASSIZES.

[^{*125}

(Civil Side.)

BEFORE MR. JUSTICE MAULE.

EVANS v. OAKLEY and PHILLIPS.

To justify a surveyor of highways in taking down a fence, under the statute 5 & 6 Will. 4, c. 50, s. 69, two things must concur: 1st, the fence must be within fifteen feet of the centre of the road; and, 2d, it must be on the road.

A road was nine feet wide; and there being a piece of unenclosed land at the side of it, also nine feet wide, which land was so rough and uneven, that no carriage ever did or could go over it, the owner of the adjoining field took this land into his field, and

put a fence round it. The surveyor of the highways took down the fence:—*Held*, that he was not justified in so doing, under the 69th section of the Highway Act, 5 & 6 Will. 4, c. 50, as the fence was not on the road.

TRESPASS.—The declaration consisted of two counts, the first count being for taking down a fence at a place called The Pound; the second count being for taking down another fence at a place called Nichols's. Plea—Not guilty, "by statute."

It appeared that the defendant, Mr. Oakley, was the surveyor of the highways of the township of Stoney Stretton; and that at that part of the highway from Westbury to Edge which is at a place called The Pound, where it passes along by the plaintiff's field, the road-way along which a carriage could pass was twenty-two feet wide; but that between that and the place where the plaintiff's fence originally stood was a piece of unenclosed ground, fifteen feet wide, and two feet above the level of the road, with a perpendicular face toward the road. This piece of unenclosed ground the plaintiff had taken into his field, and bounded on the side next the road by the fence, the pulling down of which was the subject of the first count in the declaration. The trespass which was the subject of the second count of the declaration was for pulling down another fence, by the which the plaintiff, in like manner, had enclosed another piece of what had *126] been till then unenclosed land, nine feet wide, which was at the side of the same road, which road at that part was nine feet wide; this latter piece of land being rough and uneven, so that no carriage did or could go along it. (a)

F. V. Lee, for the defendant. By the Highway Act, 5 & 6 Will. 4, c. 50, s. 69, it is enacted, "That, if any person shall encroach, by making or causing to be made any building, hedge, ditch, or other fence, on any carriage-way or cart-way, within the distance of fifteen feet from the centre thereof, every person so offending shall forfeit, on conviction, for every such offence, any sum not exceeding forty shillings; and the surveyor who shall have the care of any such carriage-way or cart-way shall, and he is hereby required to cause such building, hedge, ditch, or fence, to be taken down or filled up, at the expense of the person to whom the same shall belong." It is admitted that the defendant Oakley was the surveyor of the highways, and that the road is the public highway from Westbury to Edge; and it is also admitted that these fences which were pulled down were within fifteen feet of the centre of the road, and that the road, at the place called The Pound, was only twenty-two feet wide, and at Nichols's only nine feet wide. I therefore submit that the defendant, Oakley, as surveyor, was justified in taking them down.

*127] *MAULE, J.*, (in summing up.)—In order that a fence put up by a party should come within the provisions of the statute that has been cited, two things must concur; the one, that it must be within fifteen feet of the centre of the road; the other, that it must be on the road. If

(a) In the case of *Doe d. Pring v. Pearsey*, 9 D. & R. 908, it was held, that the presumption of law is, that waste land adjoining a road belongs to the owner of the adjoining enclosed land, whether freeholder, leaseholder, or copyholder; and, in the case of *Grove v. West*, 7 Taunt. 39, Lord Chief Justice Gibbs said, "Prima facie the presumption is, that a strip of land lying between a highway and the adjoining close belongs to the owner of the close, as the presumption also is, that the highway itself ad medium filum viæ does. But the presumption is to be confined to that extent; for, if the narrow strip be contiguous to, or communicate with, open commons or larger portions of land, the presumption is either done away or considerably narrowed, for the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them."

an encroachment were made by putting up a fence at the edge of a road as wide as Portland-place, that would not be within this enactment, because it would not be within fifteen feet of the centre of the road. So, if the road was under thirty feet wide, and the encroachment was at the side of it, but not *on* the road, it would, on that ground, not be within the 69th section of the Highway Act. Here we find that there is a road running along this line, but that the two places enclosed never were parts of that road, as no carriage ever did or could go along the steep bank at The Pound, or over the rough uneven ground at Nichols's: and if these places at which the fences were put up have never either of them been used by the public as a part of the road, the surveyor had no right to pull down the fences, because they were within fifteen feet of the centre of the road.

Verdict for the plaintiff.(a)

Talfourd, Serjt., and *Whitmore*, for the plaintiff.

F. V. Lee and *W. Johnstone Neale*, for the defendants.

(a) See the case of *Loven v. Kaye*, 6 D. & R. 20, which was a case on the construction of the 63d sect. of the Highway Act, 13 Geo. 3, c. 78, which was repealed by the stat. 5 & 6 Will. 4, c. 50.

—♦—
*(Crown Side.)

[*128

BEFORE MR. JUSTICE WILLIAMS.

REGINA v. FRANCIS CLAYTON and MARY MOONEY.

If A. counsel and encourage B. to set fire to a malt-house, and B. attempt to set it on fire, both may be jointly indicted as principals for the misdemeanor of attempting to set the malt-house on fire, although A. was not present at the time of the attempt.

MISDEMEANOR.—The prisoners were indicted for a misdemeanor in having attempted to set fire to a certain malt-house, and were jointly charged by the indictment with so attempting.

It appeared by the evidence that the prisoner Mary Mooney had gone to bed an hour and a half before the fire was discovered, and there was every reason to suppose that she was not present at the time when the fire was lighted; and the evidence, which was entirely circumstantial, tended to show that the prisoner Clayton lighted the fire only a few minutes before it was discovered. Declarations of the prisoner Mary Mooney were proved, which tended to show that she knew beforehand that the fire was to take place.

J. G. Phillimore, for the prisoners, submitted that there was no case against the prisoner Mary Mooney, on this indictment.

Greaves.—All who take any part in a misdemeanor are principals, and whatever will make a person an accessory before the fact in a felony makes him principal in a misdemeanor.

WILLIAMS, J., (in summing up.)—In misdemeanors and in treason, all who take part in the crime are principals; and in this case it is not necessary to prove that the prisoner Mary Mooney was present at the time when the prisoner Clayton attempted to set fire to the *malt-house; and if you are satisfied that she counselled and encouraged Clayton to [*129 set fire to the malt-house, she may be convicted upon this indictment.

Verdict—Not guilty.

Greaves and *W. Johnstone Neale*, for the prosecution.

J. G. Phillimore, for the prisoners.

STAFFORD ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE MAULE.

REGINA v. HIGGINSON.

To entitle a prisoner to be acquitted on the ground of insanity, he must, at the time of the committing of the offence, have been so insane that he did not know right from wrong.

MURDER.—The prisoner was indicted for the wilful murder of his son, Charles Higginson, a child five years old, by burying him alive. There was another count in the indictment, which charged the death to be by a mortal fracture of the skull.

The facts of the case were clearly proved; and it appeared that the child, who was in perfect health, was taken into a wood, and there buried by the prisoner; and on the learned judge inquiring of Mr. Greatrix, the surgeon who was called as a witness for the prosecution, whether a fracture of the skull of the child was the cause of his death, or whether the child had, after the fracture of the skull, been suffocated by being buried while alive, the prisoner said, in open court, "I put him in alive."

The prisoner, who had no counsel, made no defence, and said he had
 *130] no witnesses; but Mr. Brutton, the governor of the prison, informed Mr. Bellamy, the clerk of assize, that it had been suggested to him that the prisoner was insane. This being mentioned by Mr. Bellamy to the learned judge, his lordship desired that any person who could depose to the prisoner's state of mind would come into the witness-box.

Two of the officers of the prison, one of whom had known the prisoner since his committal on this charge, (May 20th, 1843,) and the other of whom had known him from the time of their being at school together, (the prisoner being twenty-six years of age,) being sworn, deposed to the prisoner being "of very weak intellect," and Mr. Hughes, the surgeon of the prison, who was also called, by direction of the learned judge, stated that the prisoner was of "very weak intellect, but capable of knowing right from wrong."

MAULE, J., (in summing up, after adverting to the facts of the case,) said—If you are satisfied that the prisoner committed this offence, but you are also satisfied by the evidence that, at the time of the committing the offence, the prisoner was so insane that he did not know right from wrong, he should be acquitted on that ground; but if you think that, at the time of the committing of the offence, he did know right from wrong, he is responsible for his acts, although he is of weak intellect.

Verdict—Guilty; and the prisoner was afterwards executed.(a)

Corbett, for the prosecution.

(a) The acquittal of Daniel McNaughten for the murder of Mr. Drummond, on the ground of insanity, at the Central Criminal Court, on the 5th of March, 1843, gave rise to a discussion in the House of Lords; and the following were the questions
 *131] of law propounded to the judge in relation to the law respecting alleged crimes committed by persons afflicted with insane delusion, and the opinion of the judges thereupon.

These questions, and the opinions of the judges, were ordered to be printed by the House of Lords on the 19th of June, 1843, and were as follow:—

- “1st.—What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?
- “2d.—What are the proper questions to be submitted to the jury when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime, (murder, for example,) and insanity is set up as a defence?
- “3d.—In what terms ought the question to be left to the jury as to the prisoner’s state of mind at the time when the act was committed?
- “4th.—If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?
- “5th.—Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner’s mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?

“Mr. JUSTICE MAULE.—I feel great difficulty in answering the questions put by your lordships on this occasion:—First, because they do not appear to arise out of, and are not put with reference to, a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts not inconsistent with those assumed in the questions; this difficulty is the greater, from the practical experience both of the Bar and the Court being confined to questions arising out of the facts of particular cases: secondly, because I have heard no argument at your lordships’ bar or elsewhere on the subject of these questions, the want of which I feel the more, the greater is the number and extent of questions which might be raised in argument: and, thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in [*132 criminal trials. For these reasons I should have been glad if my learned brethren would have joined me in praying your lordships to excuse us from answering these questions, but as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can, after the very short time which I have had to consider the questions, and under the difficulties I have mentioned, fearing that my answers may be as little satisfactory to others as they are to myself.

“The first question, as I understand it, is, in effect, What is the law respecting alleged crime, when, at the time of the commission of it, the accused knew he was acting contrary to the law, but did the act with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? If I were to understand this question according to the strict meaning of its terms, it would require, in order to answer it, a solution of all questions of law which could arise on the circumstances stated in the question, either by explicitly stating and answering such questions, or by stating some principles or rules which would suffice for the solution. I am quite unable to do so, and, indeed, doubt whether it be possible to be done, and therefore request to be permitted to answer the question only so far as it comprehends the question whether a person, circumstanced as stated in the question, is for that reason only to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding; and I am of opinion that he is not. There is no law that I am aware of that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as to render him incapable of knowing right from wrong. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind. If the state described in the question be one which involves, or is necessarily connected with, such an unsoundness, this is not a matter of law, but of physiology, and not of that obvious and familiar kind as to be inferred without proof.

“Second, the questions necessarily to be submitted to the jury are those questions of fact which are raised on the record. In a criminal trial, the question commonly is,

whether the accused be guilty, or not guilty; but in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions as the course which the trial has taken may have made it convenient to direct their attention to. What those questions are, and the manner of submitting them, is a matter of discretion for the judge—a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law; and if, on a trial, *such as is suggested in the question, he should

*133] have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question, as being, in my opinion, the law on this subject.

"Third, there are no terms which the judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.

"Fourth, the answer which I have given to the first question is applicable to this.

"Fifth, whether a question can be asked depends, not merely on the questions of fact raised on the record, but on the course of the cause at the time it is proposed to ask it; and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity, may be such that such a question as either of those suggested is proper to be asked and answered, though the witness has never seen the person before the trial, and though he has been present and heard the witnesses; these circumstances, of his never having seen the person before, and of his having been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful, though I will not say that an inquiry might not be in such a state as that these circumstances should have such an effect.

"Supposing there is nothing else in the state of the trial to make the question suggested proper to be asked and answered, except that the witness had been present and heard the evidence, it is to be considered whether that is enough to sustain the question. In principle it is open to this objection, that, as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry. But such questions have been very frequently asked, and the evidence to which they are directed has been given, and has never, that I am aware of, been successfully objected to. Evidence, most clearly open to this objection, and on the admission of which the event of a most important trial probably turned, was received in the case of the *Queen v. McNaughten*, tried at the Central Criminal Court in March last, before the Lord Chief Justice, Mr. Justice Williams, and Mr. Justice Coleridge, in which counsel of the highest eminence were engaged on both sides; and I think the course and practice of receiving such evidence, confirmed by the very high authority of these judges, who not only received it, but left it, as I understand, to the jury without any remark derogating from its weight, ought to be held to warrant its reception, notwithstanding the objection in principle to which it may be open. In cases even where the course of practice in criminal law has been unfavourable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of Parliament."

*134] "LORD CHIEF JUSTICE TINDAL.—"My lords, her majesty's judges, with the exception of Mr. Justice Maule, who has stated his opinion to your lordships, in answering the question proposed to them by your lordships' House, think it right, in the first place, to state that they have forbore entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your lordships' questions.

"They have, therefore, confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your lordships; and as they deem it unnecessary, in this peculiar case, to deliver their opinions seriatim, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your lordships.

"The first question proposed by your lordships is this: 'What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or

more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

"In answer to which question, assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.

"Your lordships are pleased to inquire of us, secondly: 'What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime, (murder, for example,) and insanity is set up as a defence?' And, thirdly: 'In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?' And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jury ought to be told in all *cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his [*135 crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved, that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been, to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

"The fourth question which your lordships have proposed to us is this:—'If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?' To which question the answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

"The question lastly proposed by your lordships is:—'Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, *or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was [*136 labouring under any and what delusion at the time?' In answer thereto, we state to your lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of

science, in which case such evidence is admissible. But, where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

(Civil Side.)

BEFORE MR. JUSTICE WILLIAMS.

SHENTON v. JAMES.

A paper writing, in the following form:—"On demand I promise to pay to W. S. the sum of £50, in consideration of foregoing and forbearing an action at law in the Court of Queen's Bench, for damages ascertained, by consent, to amount to that sum, by reason of the injury sustained by his wife, in respect of my liability for non-repair of a footway, in the parish of S. (signed) T. I."—is a promissory note.

ASSUMPSIT by the plaintiff, as the payee, against the defendant, as the maker of a promissory note, dated the 17th of December, 1842, for £50, payable on demand. Pleas, first, non assumpsit; and second, that the defendant was induced to make the note by the fraud, covin, and misrepresentation of the plaintiff. Replication, denying the fraud, covin, and misrepresentation.

It was opened by *Whateley*, for the plaintiff, that the plaintiff's wife, having been severely injured by a fall, occasioned by a bridge which was in a footpath being out of repair, the defendant, who was the surveyor of the highways of the parish of Seighford, in which the footpath and bridge were situate, had given the note in question to the plaintiff, in consideration of the plaintiff's forbearing to bring an action against him for negligence in not having *had the bridge properly repaired. He cited
 *137] the 5th and 94th sections of the Highway Act, 5 and 6 Will. 4, c. 50.(a)

The note, which was on a 3s. 6d. stamp, was put in and read: it was in the following form:—

"£50 0 0

Crabberly Hall, Stafford,
17th December, 1843.

"On demand, I promise to pay to William Shenton the sum of Fifty pounds, in consideration of foregoing and forbearing an action at law in the Court of Queen's Bench, for damages ascertained, by consent, to amount to that sum, by reason of the injury sustained by his wife, in respect of my liability for non-repair of a foot-way in the parish of Seighford.

"THOMAS JAMES.

"Witness, JOHN HARRIS."

R. V. Richards, for the defendant.—I submit that this is not a promissory note. It is, if any thing at all, an agreement, and ought to bear an agreement stamp.

WILLIAMS, J.—I shall not stop the case on this objection. If the Court

(a) By the former of these sections, the word "highways" in that act is to be "understood to mean all roads, bridges, (not being county bridges,) carriage-ways, cart-ways, horseways, bridleways, footways, causeways, churchways, and pavements;" and by the latter, "if any highway is out of repair," two justices may convict the surveyor of the highways, or any other party liable to repair the highway, in any penalty not exceeding £5

of Queen's Bench should think that this is not a note, you shall have the benefit of your objection.

Verdict for the plaintiff on both issues, with leave to move to enter a nonsuit.

Whateley, Carrington, and Meleyard, for the plaintiff.

**Talfourd, Serjt., and R. V. Richards*, for the defendant.

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In the ensuing term, *R. V. Richards* applied to the court of Queen's Bench to enter a nonsuit; but the court, after taking time to consider, refused a rule.(a)

(a) Baron Bayley lays down (*Bay. on Bills*, ch. 1, sect. 6) that "a bill or note must purport that the money mentioned in it shall be payable absolutely at all events; if it purport to make the payment depend on any uncertainty or contingency, the instrument is not, except in certain cases as to the stamp-duties, a bill or note; and, if it be not a bill or note ab initio, no subsequent event can make it so."

STAFFORD SPECIAL COMMISSION.(b)

BEFORE LORD CHIEF JUSTICE TINDAL, BARON PARKE, AND BARON ROLFE.

REGINA v. ARTHUR O'NEILL.

A. was indicted for speaking seditious words. He had been committed more than twenty days before, for having unlawfully caused a great number of persons unlawfully to assemble to disturb the peace, and having with those persons assembled and met together for the purpose aforesaid, to the terror of her majesty's subjects:—*Held*, that A. was entitled to traverse, as the indictment was not for the same offence as that for which he had been committed, although both the indictment and the commitment related to the same transaction.

SEDITIONS words.—The first count of the indictment stated, that the defendant, being a person of seditious and turbulent mind, &c., "wickedly and unlawfully contriving and intending to bring the laws of this realm and the constitution of this realm, as by law established, and the Commons House of Parliament, into general hatred and contempt; and further wickedly and unlawfully contriving *and intending to prevent and obstruct the collection, in due course of law, of the revenue of this kingdom, and to procure and induce the liege subjects of this realm to refuse and resist the payment of the taxes due and payable by the laws now in force; and further unlawfully and wickedly contriving and intending to persuade and induce large numbers of the subjects of this kingdom, being workmen working and labouring in certain trades, and particularly large numbers of persons working in the coal and iron trades, unlawfully and wrongfully to conspire, combine, confederate, and agree together for the purpose of obtaining an increase of their wages in the said trades, by ceasing and abstaining altogether from working and labouring in their said trades; and further wickedly and unlawfully contriving and intending to procure and cause the said workmen to hold and meet in unlawful assemblies, and to make riots, routs, and disturbances, and to break the public peace, and resist the execution of the laws, heretofore, to wit, on the 26th day of August, 1842, at Rowley Regis, in the county of Stafford, with force and arms, did address a certain discourse to divers, to wit, one

(b) For the other cases on this special commission, see *Car. & M.* 661, et seq.

thousand of the subjects of this realm then and there being assembled, of and concerning the law and constitution of this realm,*and of and concerning the Commons House of Parliament, and of and concerning the revenue and taxes of this kingdom, and of and concerning the said combination, conspiracy, and confederacy of the said workmen to obtain an increase of wages by wholly ceasing and abstaining from working and labouring in their said trades as above-mentioned,* and in different parts of the said discourse did then and there, unlawfully, wickedly, and seditiously, speak, publish, and address, in a loud voice, to and in the hearing of the said persons so assembled, amongst other things, the false, seditious, scandalous, libellous, and inflammatory words and matter following, of and concerning the laws and constitution of this realm, [repeating the words between the **,] *140] that is to *say, 'Is this a time, when trade is reviving, for masters to reduce the wages? I have myself been a close observer, and I know that trade is improving,' [setting out what the defendant said, without any innuendo,] in contempt of the laws of this realm, and against the peace," &c. The second count was similar, but was only as to words which related to the laws, the constitution, and the House of Commons. The third count related only to words spoken with respect to the collection of the revenue; and the fourth count only to words spoken with respect to the workmen having conspired to obtain a rise of wages.

The defendant had been committed on the 29th day of August, 1842, by a warrant under the hands and seals of five magistrates of the county of Stafford, on which he afterwards put in bail, which warrant was in the following form :—

County of } To the constable of the parish of Dudley, in the said county, and to the
Stafford. } keeper of her majesty's jail at Stafford, in the said county.

These are, in her majesty's name, to charge and command you, the said constable, to convey to the common jail of the said county the bodies of Arthur O'Neill and John Blanchfield, they being charged before us, the undersigned justices of the peace for the said county, on the oaths of James Jones Dransfield, Thomas Llewellyn, Charles Sindler, and Isaiah Northall, for that they the said Arthur O'Neill and John Blanchfield did, on the twenty-sixth day of August, at the parish of Rowley Regis, in the said county, with divers other persons at present unknown, unlawfully cause a great number of her majesty's liege subjects, to wit, three hundred and more, unlawfully to assemble and meet together to disturb the public peace; and that the said Arthur O'Neill and John Blanchfield, with divers other persons at present unknown, to the number of three hundred and more, did then and there, with force and arms, unlawfully assemble and meet together for the purpose aforesaid, in contempt of our lady the queen and the laws of this realm, in breach of the public peace, and to the great terror and alarm of her majesty's subjects then and there being and residing, passing and re-passing. And you the said keeper are hereby required to receive the said Arthur O'Neill and John Blanchfield into your custody, and them there safely keep, until they shall be thence delivered by due course of law, unless the said Arthur O'Neill shall sooner become bound to her majesty in the sum of two hundred pounds, with two sufficient sureties in the sum of one hundred pounds each, conditioned for the personal *appearance of the said *141] Arthur O'Neill at the next general quarter sessions of the peace to be holden for the said county, and, in the mean time, to be of good behaviour towards the queen and all liege people; and unless he the said John Blanchfield shall sooner become bound to her majesty in the sum of one hundred pounds, with two sufficient sureties in the sum of fifty pounds each, conditioned for the personal appearance of the said John Blanchfield at the next general sessions of the peace to be holden for the said county, and, in the mean time, to be of good behaviour towards the queen and all her majesty's liege people; and for so doing, this shall be your sufficient authority. Given under our hands and seals, this 29th day of August, 1842.

On the indictment being found,

F. V. Lee, for the defendant, applied to the Lord Chief Justice TINDAL to allow the defendant to traverse till the next assizes, on the ground that

the offence charged in the indictment, and the offence charged in the commitment, were different, the one offence being the speaking of seditious words, and the other the taking part in an unlawful assembly. He cited the case of *Rex v. James*, 3 C. & P. 222,(a) and *Rex v. Williams*, 1 M. & Rob. 503.(b)

Wadlington, for the crown. The cases cited are distinguishable from the present. In the cases cited, the parties had been committed for felony, and there had not been in either of them any charge of misdemeanor till the finding of the bill of indictment for the misdemeanor. Here the charge in the commitment and the charge in the *indictment, although [*142 somewhat different in form, are both for misdemeanor, and really for the same transaction. In a case of misdemeanor like the present, it is almost impossible for the committing magistrate to decide in what mode the charge is to be shaped, and if this sort of objection is to be made, nothing would be more easy than to have inserted a count in the indictment for an unlawful assembly; and, if there had been such a count in the present case, it could hardly have been contended that the defendant was entitled to traverse. In the present case, the defendant is committed for an unlawful assembly, and the principal or only evidence is language used by him of a seditious nature; and upon those same depositions, when he comes to the assizes, a bill is preferred against him, the substance of which is for using seditious language, with various unlawful intentions, one of which is to induce large numbers of the working classes to hold unlawful meetings and assemblies, and in the depositions on which the defendant was committed for the unlawful assembly, the very words are set forth which are the subject of the present indictment. The question, therefore, is, whether your lordship would put so strict a construction upon the stat. 60 Geo. 3, and 1 Geo. 4, c. 4, s. 3, as to hold that this case does not come within the meaning of the words "such offence," which are the words of that enactment. I apprehend that the meaning of the statute is, that if a party is indicted for an offence which is a misdemeanor of the same legal character, which is founded upon the same depositions, and is of the same general nature as the one for which he is committed, then he is as much bound to try when he has been twenty days either in custody or on bail, as if he were indicted for precisely the same offence, shaped in the same mode in which it was shaped by the committing magistrate. This certainly is an important case, because if the party is always entitled to traverse, unless upon full consideration, at the assizes, he is indicted for identically the same offence, in the same shape, and the same legal form *as that [*143 in which it has been shaped by the committing magistrate, it is obvious that it will, to a certain extent, repeal the statute which was intended to abridge the right which parties indicted for misdemeanor had of putting off their trial.

TINDAL, C. J.—I will take the commitment and the indictment, and

(a) In that case the prisoner had been held to bail for the then capital offence of rape more than twenty days; but the grand jury ignored the bill for the felony, and found a true bill for an assault with intent to commit a rape: and Baron Vaughan allowed the defendant to traverse, on the ground that he had not been on bail twenty days on the charge of misdemeanor upon which he was to take his trial.

(b) In that case the prisoner had been tried and acquitted for feloniously cutting, when a fresh indictment for the common assault was ordered to be preferred by the judge. On this indictment being returned, Mr. Moody, for the prisoner, applied to traverse; and, after argument, Baron Gurney held, that he was entitled to traverse, and referred to a case on the northern circuit, in which another learned judge (he believed Baron Alderson) had allowed a defendant to traverse under similar circumstances.

also look at the depositions, and I will consult my two learned brethren, and will intimate my opinion to-morrow.

TINDAL, C. J.—We have looked at the act of Parliament, and the warrant, the indictment, and the depositions, and we think that substantially it is not the same offence. The warrant having been for the commitment of the defendant for a tumultuous meeting, and after that the bill preferred against him being for seditious speeches, we do not think it is the same offence, and he is therefore at liberty to traverse.

The defendant traversed accordingly.

Follett, S. G. and *Waddington*, for the crown.

F. V. Lee, for the defendant.

The indictment having been removed by certiorari, it came on to be tried by a special jury on the Nisi Prius side of the Stafford Summer Assizes, 1843, before Mr. Justice WILLIAMS, when the defendant was convicted.

Talfourd, Serjt., *R. V. Richards*, *Godson*, and *W. J. Alexander*, for the crown.

The defendant, in person.

*144] *NORFOLK SUMMER CIRCUIT, 1843.

HUNTINGDON ASSIZES.

(*Crown Side.*)

BEFORE LORD DENMAN, C. J.

REGINA v. JANE BRAWN and THOMAS WEBB.

A., a married woman, in the lifetime of her husband, married B., who was a widower, B. having been the husband of A's deceased sister: *Held*, that this was bigamy in A., and that the circumstance, that the marriage of A. and B. would have been wholly void under the stat. 5 & 6 Will. 4, c. 54, s. 2, even if A. had been an unmarried person, made no difference:—*Held*, also, that, if B. knew at the time of his marriage with A. that she was a married woman, he might be convicted of the felony of counselling A. to commit bigamy.

BIGAMY.—The first count of the indictment charged that the prisoner had married Thomas Brawn, and afterwards married the other prisoner, Thomas Webb, the said Thomas Brawn being then alive. The second count charged that the prisoner, Thomas Webb, on, &c., at, &c., “unlawfully, maliciously, and feloniously, did incite, move, procure, counsel,(a)

(a) By the stat. 9 Geo. 4, c. 31, s. 22, it is enacted, “that if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, every such

hipe, and command the said Jane Brawn the felony aforesaid, in manner and form aforesaid, to do and commit, against the form of the statute," &c. The third count charged that the prisoner, Thomas Webb, "well knowing the said Jane Brawn to have done and committed the said felony and bigamy in form aforesaid, to wit, on the same day and year aforesaid," at, &c., "the said Jane Brawn did feloniously receive, harbour, and maintain, against the form of the statute," &c.

*It appeared that the prisoner Jane Brawn, whose maiden name was Colbert, was married to Thomas Brawn in the year 1833, at [*145 the parish church of Wood Walton, in Huntingdonshire, and that after living with him three years she left him. It further appeared that, on the 15th of October, 1839, the prisoner, Thomas Webb, married Mary Ann Colbert, the younger sister of the prisoner Jane Brawn, who died in about six months after that marriage. It was proved that the two prisoners were married by license at St. Luke's Church, Middlesex, on the 15th of April, 1843, and that the first husband of the female prisoner was alive and lived at Altonbury, which is only four miles from Wood Walton, where the prisoners both resided; and it was proved that the prisoner, Thomas Webb, saw him at Michaelmas, 1842.

Worlledge, for the prisoners.—I submit that the crime of bigamy cannot be committed by a marriage between a married woman and the widower of her sister. By the stat. 5 & 6 Will. 4, c. 54, s. 2, it is enacted "that all marriages which shall hereafter [that is, after the 31st of August, 1835] be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever," and therefore, as I submit, a marriage thus declared void cannot be taken to be good for the purpose of sustaining this charge.

Lord DENMAN, C. J.—I am of opinion that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony which constitutes the crime of bigamy, otherwise it could never exist in the ordinary cases; as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether, therefore, the marriage of the two prisoners was or was not in *itself prohibited, and therefore null and void, does not sig- [*146 nify, for the woman, having a husband then alive, has committed the crime of bigamy by doing all that in her lay by entering into marriage with another man.

Worlledge.—I submit as to the prisoner, Thomas Webb, that there is no evidence that he had any knowledge of the intention of the other prisoner to commit this felony, or that he has done any direct act to incite and induce her to commit the felony, in the terms of the second count of the indictment; and as to the last count, I submit there is no evidence whatever.

Lord DENMAN, C. J.—I think that there is nothing in the last count; but as to the other, it is a question for the jury.

Worlledge addressed the jury for the prisoners.

Lord DENMAN, C. J., (in summing up.)—With respect to Mrs. Brawn, the only question is, whether her first husband was alive at the time of her

offender, and every person counselling, aiding, and abetting such offender, shall be guilty of felony," and be liable to be transported for seven years, or imprisoned with or without hard labour for two years.

second marriage, and you have proof that he was. With regard to the other prisoner, Webb, you are to say whether he counselled Mrs. Brawn to commit the felony, but to constitute the offence in him, I think that he must be shown to have known that she was a married woman. You will say on the evidence whether you are satisfied that he knew it.

Verdict—Guilty, as to both prisoners. Sentence was, to each, two months' imprisonment.(a)

Gunning, for the prosecution.

Worlledge, for the prisoners.

(a) See the case of *Rez v. Penon*, 5 C. & P. 412.

*147] *MIDLAND SPRING CIRCUIT, 1843.

DERBY ASSIZES.

(*Crown Side.*)

BEFORE BARON ALDERSON.

REGINA v. BOWDEN.

A person who in his own dwelling-house steals the goods of another to the value of £5, may be convicted of larceny in a dwelling-house to the value of £5, under the stat. 7 Will. 4 & 1 Vict. c. 90, s. 2.

LARCENY in a dwelling-house, to the value of £5.—The indictment charged the prisoner, James Bowden, with stealing, at the parish of Glosop, on the 5th day of January, 5 Vict., “in the dwelling-house of *him the said James Bowden*, there situate,” a number of articles enumerated in the indictment, above the value of £5, the property of Harris Seagall.

It appeared that the prosecutor, who was a hawker, having a box of jewellery goods, had left his box and goods in the house of the prisoner, where he was lodging, and that the prisoner stole them therefrom.

Verdict—Guilty of the whole charge.

ALDERSON, B., entertained some doubt whether the offence charged amounted to that of stealing to the value of £5 within a dwelling-house, (the dwelling-house in the indictment being that of the prisoner himself,) in which case, by the stat. 7 Will. 4 & 1 Vict. c. 90, s. 2, the minimum punishment of transportation was for ten years, or whether the offence charged amounted only to that of simple larceny, in which case the maximum of punishment *was transportation for seven years; and his
*148] lordship reserved the question for the opinion of the judges, that they might determine which of the two sentences was the legal one.

In the ensuing term, the case was considered by the judges, and their lordships were unanimously of opinion that this was a stealing in a dwelling-house, and that judgment might be accordingly pronounced, that the prisoner should be transported for ten years.

LINCOLN SUMMER ASSIZES.

(Civil Side.)

BEFORE LORD ABINGER, C. B.

STANTON v. PATON and Wife.

If in an action for breach of promise of marriage the defendant plead that, before any breach of the promise, the parties mutually agreed to exonerate each other from their promises, and this be denied by the replication: *Held*, that on these pleadings the defendant is entitled to begin.

BREACH of promise of marriage.—The declaration stated, that while the defendant Ellen Willerton was sole and unmarried, to wit, on the 1st day of January, 1842, in consideration that the plaintiff, being then unmarried, then had promised to marry her, she then promised to marry him. Breach, that she married a certain other person than the plaintiff, to wit, the other defendant. Plea, “that after the making of the said promise by the said Ellen Willerton, as in the said declaration mentioned, and before any breach thereof by the said E. W. or the plaintiff, and before the marriage of the defendant, and whilst the said E. W. was sole and unmarried, and long before the commencement of this suit, to wit, on the 1st day of January, 1842, it was mutually agreed by and between the plaintiff *and the defendant, the said E. W., that they, the plaintiff, and the defendant, the said E. W., should respectively exonerate, release, [*149 and discharge each other from the performance of the said respective promises in the said declaration mentioned; and, in consideration that the defendant, the said E. W., at the request of the plaintiff, had then exonerated, released, and discharged him, the plaintiff, from the performance of his said promise to marry her, the said E. W., he, the plaintiff, then exonerated, released, and discharged her, the said E. W., from the performance of her said promise”—(concluding with a verification.) Replication—“That it was not mutually agreed by or between the plaintiff and the said E. W., that they, the plaintiff and the said E. W., should respectively exonerate, release, and discharge each other from the performance of their said respective promises in the declaration mentioned, nor did the plaintiff exonerate, release, or discharge the said E. W. from the performance of her said promise, in manner and form as the defendants have in their said plea alleged”—(concluding to the country.)

M. D. Hill, for the defendants, claimed the right to begin, as it lay upon the defendants to prove the only issue which was raised on the record; this being an action on a contract, and the contract being admitted by the pleadings.

Whitehurst, for the plaintiff.—In this case the plaintiff goes for substantial damages, and although this action is in point of form an action upon a contract, yet it is an action for a personal injury, and it should therefore fall within the rule laid down by the judges in the case of *Carter v. Jones*, 6 C. & P. 64, that the plaintiff should begin, although the proof of the issue lies on the defendant.

Lord ABINGER, C. B., (having conferred with *PATTESON, J.)— [*150 We think that in this case the defendants have the right to begin.

M. D. Hill, for the defendant, began.

Verdict for the defendant.

Whitehurst and *Boden*, for the plaintiff.

M. D. Hill and *Humfrey*, for the defendant.

WESTERN CIRCUIT, 1840.

HAMPSHIRE SUMMER ASSIZES.

BEFORE MR. SERJEANT MANNING.

REGINA v. GEORGE WHILEY.

If an indictment for bigamy be tried at the same assizes at which the bill is found, it will sufficiently appear by the caption of the indictment, that the party is in custody in the county, so as to give the court jurisdiction under the stat. 9 Geo. 4, c. 31, s. 22, and there need not, in that case, be any averment in the indictment as to the custody.

BIGAMY.—The indictment, which consisted of only one count, was found at the same assizes at which the prisoner was tried. It stated that the prisoner's first marriage took place at Kirton, in Lindsay, in the county of Lincoln, and his second marriage at the parish of All Saints, in the county of Cambridge, and the indictment contained an allegation that the prisoner "afterwards, to wit, on the 18th April, at the parish of Saint Maurice, in the city and borough of Winchester, in the said county of Southampton, was in custody."

*151] "It was proved that the two marriages took place as stated in the indictment, and that the first wife was alive; and it was proved by the superintendent of police at Winchester, that he received the prisoner into his custody on the 26th March, 1840, and that, from that time to the time of the present trial, the prisoner had remained in Winchester jail. The commission day of the assizes at which the present indictment was found, was the 14th of July, 1840.

Cockburn, for the prisoner.—I submit that this indictment is bad. It neither charges that the offence was committed in the county of Southampton, nor that the prisoner was apprehended there, and it therefore ought to have been averred that the prisoner was in custody in that county at the time of the taking of the inquisition. The words of the stat. 9 Geo. 4, c. 31, s. 22, are, "and any such offence may be dealt with, inquired of, tried, determined, and punished in the county where the offender shall be apprehended or *be* in custody, as if the offence had been actually committed in that county." If the prisoner was in custody in that county on the 18th of April, but was not in custody in the county in July when the grand jury found the bill, the grand jury of the county of Southampton had no authority to find the bill.

MANNING, Serjt., (after conferring with **MAULE**, J.,) reserved the point for the consideration of the fifteen judges. Verdict—Guilty.

Carrow, for the prosecution.

Cockburn, for the prisoner.

*15] *Before Lord DENMAN, C. J., TINDAL, C. J., Lord ABINGER, C. B., LITLEDALE, J., PARKE, B., BOSANQUET, J., ALDERSON, B., PATTESON, J., WILLIAMS, J., GURNEY, B., COLERIDGE, J., COLTMAN, J., MAULE, J., and ROLFE, B.

Cockburn, for the prisoner.—The question is, whether to give the court jurisdiction there should have been an averment that the prisoner was in

custody in the county of Southampton at the time of the taking of the inquisition. In the case of *Rex v. Fraser*, R. & M. C. C. 407, which occurred in the year 1834, which was after the passing of the stat. 9 Geo. 4, c. 31, the prisoner was convicted of bigamy by a Middlesex jury; the bigamy was committed in Surrey, and it was discovered, after the trial, "that the indictment contained no averment as to the place or county where the prisoner was apprehended," and the judgment was arrested although the prisoner was proved to have been apprehended in Middlesex. That, then, shows that it is necessary to aver such facts as will give the court jurisdiction; and it is an established rule, that, where the matter is out of the ordinary jurisdiction, the special circumstances must be averred to give the court jurisdiction. So, in inferior courts, it must be alleged on the face of the declaration that the cause of action occurred within the jurisdiction of the court.

PARKE, B.—Your proposition, that it is necessary to state special circumstances in the indictment to give jurisdiction, is not universally correct. On the trial of Berwick, one of the rebels, in 1746, Mr. Justice Foster says, *Fost. 12*, that it was objected by Serjts. Wynne and Eyre, that the act (a) "impowers the crown to issue commissions for trying *persons then in custody, or who shall be in custody, for high treason in levying war, [*153 before the 1st day of January next, and it is not alleged in the indictment that the prisoners were in custody at the time of the indictment, and consequently it doth not appear on the record that the court hath any jurisdiction over the prisoners. To this it was answered by the attorney-general, and agreed by the court, that it doth sufficiently appear on the record as it now stands, *though not indeed on the indictment*, that the prisoners are in custody; the record allegeth that the prisoners, at the time of their arraignment, being brought to the bar in the custody of the sheriff, to whose custody they had before been committed for the cause aforesaid, were asked, &c. The common commission of jail delivery extendeth only to prisoners in actual custody, and yet it was never thought necessary to allege in the indictment that the defendant was then actually in prison; and if this exception was to prevail, it would impeach all the judgments that ever have been given at any sessions of jail delivery. That the act on which the Preston rebels were tried runs in the very words of this act: all the indictments at that time were as these are, and this very exception was then taken and overruled. Lord Chief Justice Lee produced a note he took at that time in the case of the king and *Oxburgh; the same excep- [*154

(a) The stat. 19 Geo. 2, c. 9. The first section of this statute is not printed either in Ruffhead's or Raithby's edition of the statutes at large; but it is in the folio edition of the statutes of that year, p. 179, which will be found in the library of the Court of Chancery. By that statute, after reciting that great numbers of persons who had joined in the rebellion of 1745, were then in custody in different counties, it is, by sect. 1, enacted, "That all and every the said offenders who are now in actual custody for or on account of the said rebellion and high treason, in levying war against his majesty, and all other persons who are or shall be guilty of high treason in levying war against his said majesty within this realm, and shall be apprehended and imprisoned for the same on or before the 1st day of January, 1746, may be proceeded against for the said treason; and the said treason may be inquired of, heard, and determined before such commissioners of oyer and terminer, or jail delivery, in such county or counties, shire or shires, of this realm, as shall be assigned by the king's majesty's commissioners, under the great seal of Great Britain, and by good and lawful men of the body of the same counties or shires respectively, in like manner and form, to all intents and purposes, as if such treasons had been done, perpetrated, and committed within the same counties or shires where they shall be so inquired of, heard, and determined as aforesaid, any law or usage to the contrary thereof notwithstanding."

tion was then taken and overruled upon the reason last before given: and judgment was then given [in Berwick's case] as in cases of high treason."

Cockburn.—In the case of *Rex v. Fraser* the point must have arisen.

ALDERSON, B.—The point considered in Fraser's case was on the apprehending and not on the custody.

Cockburn.—But it seems to have been conceded, then, that an averment was necessary to give jurisdiction.

GURNEY, B.—It would appear by the caption of this indictment, that the party was in custody if the caption was drawn in the usual form. Where the party is tried at the same assizes at which the indictment is found, the caption states that the indictment was found by the grand jury on the commission of oyer and terminer, and that on the same day it is delivered to the judges as commissioners of jail delivery, and that the prisoner is brought to the bar in the custody of the sheriff.

Cockburn.—That mode of answering the objection would have supported the indictment in Fraser's case.

ALDERSON, B.—That case was not argued, and might not have been much considered.

GURNEY, B.—A person never can be tried for felony unless he is in custody.

Cockburn.—I put it that the grand jury, in a case like the present, cannot find a bill unless the party be *then* in custody in the county.

LITLEDALE, J.—How would it be if the party had been bailed?

*155] *Cockburn*.—He would then be in custody of his bail.

PARKE, B.—It will appear by the caption, that the prisoner was on that day brought to the bar in custody.

Cockburn.—I submit that when the prisoner pleads, he cannot go beyond the indictment, and that the indictment cannot be aided by the caption.

Carrow, for the prosecution.—We have followed the words of the act, and the indictment is in the usual form. In the case of *Rex v. Gordon*, R. & R. C. C. 48, the prisoner had been apprehended for another offence, and had been detained for bigamy, and that was held to be an "apprehension" for the bigamy within the stat. 1 Jac. 1, c. 11, s. 3; and there seems to be no doubt that the words relating to the custody, which are introduced into the stat. 9 Geo. 4, c. 31, s. 22, were meant to include cases where the party was apprehended in another county.

PATTESON, J.—In the case of *Rex v. Gordon*, the allegation was, that he was apprehended in Worcestershire, the fact being that he was detained there.

ALDERSON, B.—The judges there held, that his being detained was equivalent to an apprehension.

GURNEY, B.—In the case in Foster, the grand jury in Surrey found an indictment for an offence committed at Carlisle. In the case of *Rex v. Fraser* the custody does not appear to have been considered at all.

ALDERSON, B.—It is one thing to say that it is necessary that a person should be in custody, and another that it must appear on the face of the indictment.

*156] *Cockburn*, in reply.—I submit, that, as the grand jury are allowed to find this bill under this act, there must be such averments as will show their jurisdiction. To give the jurisdiction, it must be proved that the party was in custody when the bill was found, and if it must be proved, it must be averred on the face of the indictment.

PARKE, B.—The same observation would have applied to the treason case in 1746.

ALDERSON, B.—That case is quite in point.

COLERIDGE, J.—Suppose that the prisoner had demurred?

COLTMAN, J.—The whole record would then have been made up, and by the caption it would have appeared that the party was in custody.

LORD DENMAN, C. J.—In Eneas Macdonald's case, Fost. C. L. 59, the indictment was different from that of Berwick and several of the other rebels, because the indictment and proceedings were after the 1st of January, 1746.

Cockburn.—If we had demurred, I apprehend that the caption could not be referred to.

LORD ABINGER, C. B.—The record would then have been made up to the time of the joinder in demurrer, and would have had the caption.

LORD DENMAN, C. J.—The present indictment seems to state an immaterial fact as to the jurisdiction.

PARKE, B.—The question is, whether Mr. Cockburn is *correct [*157 in his position that it is necessary to state in the indictment all things which are necessary to give the court jurisdiction. As this case comes before us on a point which is in arrest of judgment, we should have the record and caption.

BOSANQUET, J.—Mr. Cockburn, how do you distinguish this from the case of the rebels?

Cockburn.—I do not at present see any distinction; but your lordships would not perhaps be bound by one case, against the broad principle, that all that must be proved must be averred.

GURNEY, B.—Some very eminent judges sat on the special commission in 1746.(a)

The case was afterwards considered by the judges, who held the conviction right, on the ground that the prisoner's being in custody, in the county of Southampton would have sufficiently appeared from the caption of the indictment.

(a) It appears, from Fost. C. L. p. 1, that that commission was directed to every privy councillor by name, and to all the judges; and it appears, from Berwick's case, (18 St Tr. 367,) and Deacon's case, tried on the same day, (Id. 365,) that the judges then present were Willes, C. J., Abney, J., and Foster, J.; and that the judges present at the trial of Mr. Townley (Id. 329) were Lee, C. J., Willes, C. J., Wright, J., Denison, J., Foster, J., Abney, J., Reynolds, B., and Clive, B.

*158] *NORTHERN SUMMER CIRCUIT, 1843.

YORK ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE CRESSWELL.

REGINA v. ACKROYD and JAGGER.

A certificate of a previous conviction under the stat. 7 & 8 Geo. 4, c. 28, s. 11, must state that judgment was given.

ROBBERY.—The indictment charged that the prisoners had been previously convicted of felony.

The robbery having been proved, and the prisoners found guilty of it, *Overend*, for the prosecution, put in a certificate, signed by the clerk of assize of the Northern Circuit, which certified that, at the assizes and general jail delivery, holden, &c., the prisoners were, in due form of law, "tried and convicted" of a felony, the particulars of which were set out in the certificate; but in the certificate there was no statement that any judgment had been given on that conviction.

CRESSWELL, J.—This certificate is not sufficient. It does not state that any judgment was given. The judgment may have been arrested.

Overend.—The stat. 7 & 8 Geo. 4, c. 28, s. 11, provides that "a certificate, containing the substance and effect only, omitting the formal part of the indictment and conviction for the previous felony," signed by the *159] proper officer, shall be sufficient evidence. All these requisites have been complied with. The statute uses the word "convicted; and this certificate states that the prisoners were "convicted."

CRESSWELL, J.—I think that it is not sufficient.

Overend, for the prosecution.

Bliss, for the prisoners.

REGINA v. SPENCER and Others.

Where a prisoner is indicted for a felony after a previous conviction under 7 & 8 Geo. 4, c. 28, s. 11, it is sufficient to allege in the indictment that the prisoner was "convicted of felony," without stating the judgment.

BURGLARY.—The indictment, after stating the principal felony, proceeded, "And the jurors aforesaid, upon their oath aforesaid, do further present, that at the general quarter sessions of the peace, holden," &c., the said, &c., "were duly convicted of felony," without any further allegation as to the judgment.

The prisoners having been found guilty, and the jury having found that they had been previously convicted of felony,

Overend moved in arrest of judgment, and referred to the preceding case of *Regina v. Ackroyd and Another*, and contended that, as his lordship had held that it was necessary for the certificate of a previous conviction to contain a statement of the judgment, a fortiori, it was essential for the indictment to contain such an allegation.

CRESSWELL, J.—I think it is sufficient for the indictment to allege gene-

rally that the party has been convicted; though I have held, and do hold, that the certificate of a previous conviction cannot be given in evidence without a statement of the judgment on the first indictment.

*Sentence was passed on the prisoners.(a)

[*160

Bliss, Pashley, and Hardy, for the prosecution.

Wilkins and Overend, for the prisoners.

(a) The stat. 7 & 8 Geo. 4, c. 28, s. 11, in providing for the form of indictment, enacts, that "it shall be sufficient to state that the offender was, at a certain time and place, convicted of felony, without otherwise "describing the previous felony." And, with respect to the certificate, the same section enacts, that it is to contain the substance and effect "of the indictment and conviction." In the case of *Griffith v. Harris*, (2 Mees. & Wels. 341,) Lord Abinger said, "All convictions before magistrates should embrace two things: first, the adjudication of the fact which forms the crime; and, secondly, the pronouncing the judgment, which the magistrate is empowered to pronounce upon the crime: and if either of these essentials be imperfect, then the conviction is bad."

(Civil Side.)

BEFORE MR. JUSTICE WIGHTMAN.

TOWNSEND v. SMITH.

Semble, that a plea puis darrein continuance at Nisi Prius should be tendered to the judge within the eight days allowed by the Reg. Gen. of Hilary term, 1834, though the cause may not have been reached in its turn.

PASHLEY, for the defendant, on the fifth day of the assizes, applied on behalf of the defendant for leave to plead a release given by the plaintiff to the defendant since the issuing of the jury process, and within eight days of the day on which the application was made. The plea was accompanied by the affidavit required by Reg. Gen. 2, Hilary term, 4 Will. 4.

WIGHTMAN, J.—Why not wait until the cause is called on in its turn, and then the counsel for the plaintiff will be present?

**Pashley*.—The cause is entered so low in the list, that the eight days within which the plea must be pleaded will have elapsed long before the cause is reached in its turn. It is immaterial whether the plaintiff or his counsel be present or not, as, on the plea being duly verified by affidavit, the judge of assize, as I submit, has no discretion on the subject, but must receive the plea. [*161

WIGHTMAN, J.—I think that I am bound to receive the plea.

Addison, for the plaintiff.

The plea was received.(a)

Pashley, for the defendant.

(a) By the rule of H. T., 4 Will. 4, No. 2, it is provided, "that in all cases in which a plea puis darrein continuance is now, by law, pleadable in Banc or at Nisi Prius, the same defence may be pleaded with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be. Provided, also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, unless the court or judge shall otherwise order." It is worthy of consideration whether the eight days within which a plea puis darrein continuance must be pleaded, since this rule, are to be calculated up to the day of pleading, or up to the first day of the assizes. In the present case, Addison, for the plaintiff, some days after this plea was pleaded, did apply to the learned judge to strike out the plea, on an affidavit of the plaintiff's attorney that the release had been obtained behind his back by collusion between the plaintiff and defendant, and contrary to an express agreement between the attorney and his client, the plaintiff. The learned judge considered that he had no authority so to do, but that, had it been a question for his discretion to allow or reject the plea, the result might have been different.

*162]

*DURHAM ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE CRESSWELL.

BELL v. SIR WILLIAM CHAYTOR, Bart., and Others.

Assumpsit by a servant against his master, for not employing him under a written agreement to serve for a year, which had not expired. The agreement was produced under notice :—*Held*, that it was not necessary to call the subscribing witness to prove the execution.

ASSUMPSIT.—The declaration alleged that the defendants retained the plaintiff, a collier, as their servant for one year, (not expired,) and to find him employment every working day, with the exception of a fortnight at Christmas, and to pay him at the rate of 5s. for every day in which he was not employed. Breach, that the defendants did not employ the plaintiff every working day, or pay him the sum agreed.

Plea, non assumpsit.

On the part of the plaintiff, the agreement stated in the declaration between the defendants of the one part, and the several persons who had executed it, of whom the plaintiff was one, of the other part, was called for under a notice to produce. The defendants' counsel produced a paper, and handed it to the plaintiff's counsel. The paper corresponded with the terms of the notice to produce. There was an attesting witness. It was then tendered in evidence.

Granger and *F. Robinson* submitted, that the attesting witness must be called; for that, wherever a deed or instrument in writing has a subscribing witness, the rule was that the witness must be called to prove the execution of such deed or instrument. That the only exception to the rule, was the case of a party producing an instrument under which he claimed a beneficial interest, and that the interest must be an interest in the cause.

*163] *Hindmarch*, for the plaintiff, cited the case of *Bradshaw v. Bennett*, 5 C. & P. 48.(a)

Granger.—That case falls within the rule we are contending for.

CRESSWELL, J.—Adopting your statement of the law, according to the case as it now stands, you do claim an interest in this man's services under the agreement, and therefore I shall receive the document as evidence. There is, however, a case of *Doe* on the demise of *Tyndal v. Hemming*, 9 D. & R. 15,(b) which goes rather farther as an exception to the rule than the argument of the defendant's counsel would admit.

The evidence was received.

Verdict for the defendants.

Hindmarch, for the plaintiff.

Granger and *F. Robinson*, for the defendants.

(a) In that case the vendee brought assumpsit against the vendor to recover back a deposit paid on the purchase of real property; and the defendant, at the trial, produced (under a notice to produce) the agreement which had been signed at the foot of the conditions of sale; and it was held, that it was not necessary to call the subscribing witness to prove the execution of the agreement.

(b) In that case, the attorney for the lessor of the plaintiff obtained from the defendant an existing lease to him of the premises in question, for the purpose of preventing the defendant from setting it up as a defence to the action; and it was afterwards produced at the trial, pursuant to notice from the defendant; and it was held, that he had thereby admitted the validity of the lease, and that it might be used in evidence on the part of the defendant without proof of its execution.

*LIVERPOOL ASSIZES.

[*164]

(Crown Side.)

BEFORE MR. JUSTICE WIGHTMAN.

REGINA v. JOHN SIMMONSTO.

On an indictment for bigamy, the first marriage may be proved by the admissions of the prisoner; and it is for the jury to determine whether what he said was an admission that he had been legally married according to the law of the country where the marriage was solemnized.

BIGAMY.—The prisoner was indicted for marrying one Eliza Kershaw, his former wife, Mary, being then alive. To prove the first marriage, a witness was called, who stated that the prisoner had several times said that he was married to Mary Carlisle (his first wife) by Dr. Sinclair, a Presbyterian minister in orders, in New York, in North America; that they lived together as man and wife; and that the witness was present at the christening of a child of the prisoner by Mary Carlisle. Several other admissions by the prisoner, that Mary Carlisle was his wife, were proved; and it was also proved that on one occasion, when before the magistrates, he had promised to allow her, as his wife, 8s. a week.

Wilkins, for the prisoner, submitted, that, on this evidence, there was no case for the jury. The prosecution must prove a legal first marriage. It must be shown that the ceremony was valid according to the laws of the country where it was celebrated. It must be performed by a person in a place, and in a manner, that the laws of the country require. The present proof fails in each particular.

WIGHTMAN, J.—Mr. Hulton, you must show a marriage good according to the laws of the country where it took place, or at least a marriage that would have been good in this country before the marriage act. You do neither.

**Hulton* cited *Truman's case*, 1 East, P. C. 470.(a)

WIGHTMAN, J.—The difficulty I have in this case is, that it is [*165] not a simple admission of a marriage which it might be contended was to be understood as being a legal marriage, but your admission is of a marriage by a Presbyterian minister in New York. You must take the admission altogether. It would not have been a good marriage in this country before the marriage act, and where is the proof that it was a good marriage by the law of the state of New York? [His lordship having con-

(a) In that case, proof of the prisoner cohabiting with, and acknowledging himself married to, a former wife, then living, backed by the production of a copy of a proceeding in a Scotch court against them, for having contracted such marriage improperly, (the marriage, however, being still good according to that law,) was held, by the twelve judges, to be sufficient evidence of the first marriage, on an indictment for bigamy. And Mr. Starkie says, (Law of Ev. 3d ed. vol. ii. p. 894.) "I have known a prisoner to be convicted of bigamy upon proof of his deliberate admission of both marriages, in the presence of his first wife, before a magistrate." And in the case of *Regina v. Upton*, tried at the Gloucester Spring Assizes, 1839, (1 Greav. Ed. of Russ. C. and M. 216,) where it was proved that the prisoner, being charged with bigamy, made a statement before a magistrate, in which he expressly declared that he had married his first wife, who was then present. Mr. Justice Erskine left the case to the jury, observing, that this was not an incautious statement made without due attention, but that the prisoner's mind was directed to the very point by the charge made against him.

ferred with Mr. Justice CRESSWELL, said]—I shall leave the case to the jury, for them to say, whether, on the prisoner's own admissions, he was a person who might, in the state of New York, be legally married by a Presbyterian minister, and that he had been so married; and whether the admissions satisfy the jury that the marriage in New York was binding on him by the law of that country.

Wilkins, for the prisoner, addressed the jury, and contended that they ought not to bastardize the children of the second marriage on the admissions of the prisoner, *perhaps mis-stated or highly coloured. He *166] cited Phillips on Evidence, 9th ed. p. 359, as showing, "Where admissions involve matters of law as well as matters of fact, they are obviously entitled to very little respect, and in some instances they have been altogether rejected."

WIGHTMAN, J., (in summing up.)—The question is, whether you are satisfied that the first marriage of the prisoner took place according to the law of the country where it was solemnized. You have no proof of what the law of marriage is there, but, if you believe the witnesses who have proved admissions, you will say whether they satisfy you that the prisoner was legally married. Admissions depend much on the circumstances under which they are made. He is represented to have said not only that he had been married, but that he had been so married by a Presbyterian minister, Dr. Sinclair. To convict the prisoner, you must be satisfied that it was a marriage according to the law of the country where it took place, or according to the law of England before the marriage act. It was not a good marriage according to the law of England before the marriage act, therefore the first question is the only one for your consideration. Do the admissions satisfy you that the marriage was good, either because by the law of New York a Presbyterian minister may there marry any person, or because the prisoner was a person who might be lawfully married by such a minister?

Verdict—Not guilty.(a)

Hulton, for the prosecution.

Wilkins, for the prisoner.

(a) See the case of *Regina v. Dent*, ante, p. 97.

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*(Civil Side.)

BEFORE MR. JUSTICE CRESSWELL.

BLACKBURNE v. DAVIS.

The father of an apprentice covenanted in the indenture to provide his son with washing, &c.; after that the master suggested that the father should allow the son £20 a year, and the master supply the son with washing, &c., and the son pay him for it. This was acceded to, and the master accordingly supplied the washing, &c.:—*Held*, that the master could not recover in an action of covenant on the indenture against the father for his not providing the son with washing, &c., if the master provided the washing, &c., by agreement on the credit of either the father or the son; and that, in an action on the covenant, a plea of performance by the father was supported by proof of these facts.

COVENANT on an indenture of apprenticeship, by which the defendant, who was the father of the apprentice, covenanted with the plaintiff, who

was the master, to supply his son, inter alia, with washing and mending. Breach, alleging that the defendant had broken his covenant by not supplying such washing and mending.

Plea, performance of the covenant.

At the time when the apprenticeship took place, the plaintiff was living in lodgings. He afterwards married and took a house. The apprentice, who was called as a witness, stated that the plaintiff then suggested that the washing had better be done in the house, and that it was arranged that the father should allow his son £20 a year, and he was to pay for his own washing out of it. He had also given a note to the plaintiff for the amount due.

W. H. Watson and *Addison*, for the plaintiff, contended that this did not prove the plea.

CRESSWELL, J.—There will be two questions for the jury. First, do they believe that the plaintiff entered into an arrangement to find the necessary washing and mending on the credit of the father? If so, I shall direct them that the plaintiff cannot recover in this form of action. I shall hold that this was a performance of the covenant, as if the washing and mending had been supplied by a third party. There will be a debt due from the defendant, to be recovered in another form of action. The other question will be, whether the plaintiff, from the time of the £20 allowance, agreed to look to the son for payment. In either of these alternatives, they will find for the defendant. [*168]

Verdict for the defendant. The jury adding, the plaintiff agreed to look to the son after the supply of the £20.

W. H. Watson and *Addison*, for the plaintiff.

S. Martin, for the defendant.

HOME CIRCUIT.

SUSSEX LENT ASSIZES, 1843.

(*Crown Side.*)

BEFORE LORD DENMAN, C. J.

REGINA v. JOSEPH HILL.

An indictment against a bankrupt on the 112th sect. of the Bankrupt Act, 6 Geo. 4, c. 16, for not surrendering on the forty-second day, is bad, if it does not allege that he had an intent to defraud his creditors. The words "with intent to defraud his creditors" apply to all the offences under that section.

THE prisoner was indicted under the 112th section of the Bankrupt Act, (6 Geo. 4, c. 16,) for not surrendering on the forty-second day.

The first count of the indictment stated, "that heretofore, and before the committing of the offence hereinafter mentioned, to wit, on the 25th day of April, in the fifth year of the reign of our sovereign lady Victoria, at the parish of St. Andrew, in the city of Chichester, and county

*169] of Sussex, Joseph Hill, late of the parish aforesaid, in the county aforesaid, grocer, dealer, and chapman, being a trader within the meaning of the laws relating to bankrupts, was indebted to James Kemp, of Great Tower-street, in the city of London, wholesale tea-dealer, in a certain sum of money exceeding the sum of £100, to wit, the sum of 157*l.* 10*s.* 4*d.*, for the price and value of certain goods and merchandise, before then sold and delivered by the said James Kemp to the said Joseph Hill; and that the said Joseph Hill, so being such trader, and indebted as aforesaid, afterwards, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did commit an act of bankruptcy, (that is to say,) by departing from his dwelling-house, with intent thereby to defeat and delay his creditors. That afterwards, to wit, on the 29th day of April, in the year aforesaid, at the parish aforesaid, in the county aforesaid, a fiat in bankruptcy was issued against the said Joseph Hill, and the said Joseph Hill was thereupon then and there duly declared a bankrupt; of the issuing of which fiat, and of his so having been declared a bankrupt, notice in writing was then and there left at the usual place of abode of the said Joseph Hill, and notice was also then and there given in the London Gazette of the issuing of the said fiat, and of the meeting of the commissioners under the same; and the said Joseph Hill so being declared bankrupt, and the said notices being so given as aforesaid, he, the said Joseph Hill, feloniously did not, before three of the clock upon the forty-second day after the said notices were so left and given as aforesaid, surrender himself to the said commissioners, but wholly neglected and omitted so to do, nor hath he as yet surrendered himself to the said commissioners, against the form of the statute," &c. Second count, "That heretofore, and before the committing of the offence hereinafter mentioned, to wit, on the 25th day of April, in the fifth year, &c., at, &c., the said Joseph Hill was a trader within the meaning of the laws relating to bankrupts; and that afterwards, to wit, on the 29th day of April, in the year aforesaid, at, &c., the said Joseph Hill, so being such trader, a fiat in bankruptcy was issued, against the said Joseph Hill, and the said Joseph Hill was thereupon then and there duly declared a bankrupt; of the issuing of which fiat and of his so having been declared a bankrupt, notice in writing was then and there left at the usual place of abode of the said Joseph Hill, and notice was also then and there given in the London Gazette of the issuing of the said fiat and of the meeting of the commissioners under the same; and the said Joseph Hill so being declared bankrupt, and the said notices being so given as aforesaid, he, the said Joseph Hill, did not, before three of the clock upon the forty-second day after the said notices were so left and given as aforesaid, surrender himself to the said commissioners, but wholly neglected and omitted so to do, nor hath he as yet surrendered himself to the said commissioners, against the form of the statute," &c.

C. Chadwicke Jones, for the prisoner, proposed to cross-examine the messenger under the fiat, with a view of showing that the prisoner had no intention of defrauding his creditors.

E. James, for the prosecution.—I submit that that is immaterial to this charge, which is, that the prisoner did not surrender on the forty-second day.

C. Chadwicke Jones.—It is necessary that the jury should be satisfied that the non-surrender of the prisoner (the bankrupt) was with intent to defraud his creditors.

Lord DENMAN, C. J.—It is not so alleged in this indictment.

E. James.—I submit, that, although an intent to defraud may be essential where the act charged is one of *misfeasance, as in the case of removing or concealing books or papers, it is not in one of non- [*171 feasance, where the charge is the omission to do some act prescribed by the statute; and the position of the words “with intent to defraud his creditors,” in the 112th section of the Bankrupt act, 6 Geo. 4, c. 16,(a) goes to show that this was intended by the legislature.

LORD DENMAN, C. J.—I think that the objection is one to the form of the indictment. In my opinion, the words “with intent to defraud his creditors,” in the 112th section, override the whole of that clause. I will, however, not *stop the case at present; and I will confer with my [*172 Brother PATTESON on the point.

The case proceeded; but before the verdict was returned,

LORD DENMAN, C. J., (having consulted with PATTESON, J.) said—We are clearly of opinion that the omission to allege in this indictment that there was an intent in the prisoner to defraud his creditors, is a fatal objection.

C. Chadwicke Jones.—Should not the prisoner be acquitted?

LORD DENMAN, C. J.—No. In my opinion, the case, as charged in this indictment, has been proved; and if I were to direct the jury upon the facts, I should direct them to find the prisoner guilty, and leave you to move in arrest of judgment, or to bring a writ of error.

The indictment was quashed by consent.

E. James and *J. J. Johnson*, for the prosecution.

C. Chadwicke Jones, for the prisoner.

(a) By this section it is enacted, “That, if any person against whom any commission has been issued, or shall hereafter be issued, whereupon such person hath been or shall be declared bankrupt, shall not, before three o'clock upon the forty-second day after notice thereof in writing to be left at the usual place of abode of such person, or personal notice in case such person be then in prison, and notice given in the London Gazette of the issuing of the commission, and of the meetings of the commissioners. surrender himself to them, and sign or subscribe such surrender, and submit to be examined before them, from time to time, upon oath, or being a quaker, upon solemn affirmation; or if any such bankrupt upon such examination shall not discover all his real or personal estate, and how and to whom, upon what consideration, and when he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto (except such part as shall have been really and bona fide before sold or disposed in the way of his trade, or laid out in the ordinary expense of his family;) or if any such bankrupt shall not upon such examination deliver up to the commissioners all such part of such estate, and all books, papers, and writings relating thereunto, as be in his possession, custody, or power, (except the necessary wearing apparel of himself, his wife, and children;) or if any such bankrupt shall remove, conceal, or embezzle any part of such estate, to the value of ten pounds or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of felony, and be liable to be transported for life, or for such term, not less than seven years, as the court before which he shall be convicted shall adjudge, or shall be liable to be imprisoned only, or imprisoned and kept to hard labour, in any common jail, penitentiary house, or house of correction, for any term not exceeding seven years.”

*173] *SUSSEX SPRING ASSIZES, 1843.

(Crown Side.)

BEFORE LORD DENMAN, C. J.

REGINA v. CARTER.

A person who breaks into a blacksmith's shop, and steals goods there, may be convicted of breaking into a shop, and stealing goods, under the stat. 7 & 8 Geo. 4, c. 29, s. 15.

THE prisoner was indicted under 7 & 8 Geo. 4, c. 29, s. 15, for breaking and entering a certain shop in the parish of Funtington, in the county of Sussex, and stealing therein a certain gun.

It was proved to be an ordinary blacksmith's shop, containing a forge, and used as a workshop only, not inhabited nor attached to any dwelling-house. It was secured by a door fastened from the outside and a window-shutter bolted within, which latter had been forced.

The prisoner was undefended, but *J. J. Johnson*, for the prosecution, suggested whether the indictment could be sustained so far as the breaking and entering were concerned, and called his lordship's attention to *Reg. v. Saunders*, 9 C. & P. 79.

LORD DENMAN, C. J.—I cannot be governed by that case. In my opinion this building has been proved to be such as to fall within the definition in the act of Parliament.

The prisoner was found guilty generally.

J. J. Johnson, for the prosecution.

*174] *SURREY SPRING ASSIZES, 1843.

BEFORE MR. JUSTICE PATTESON.

REGINA v. ARCHER and Four Others.

On an indictment for feloniously wounding with intent to do grievous bodily harm, some of the prisoners may be convicted of the felony, and another of them of an assault, under the 11th sect. of the stat. 7 Will. 4 and 1 Vict. c. 85.

WOUNDING.—The indictment charged the prisoner Archer, and the four others, with having, in the month of May, 1841, cut and wounded George Collier, with intent to murder, to disable, and to do him some grievous bodily harm.

The four other persons were tried before Mr. Serjt. Taddy, at the Summer Assizes for the county of Surrey in the year 1841, and were all convicted of the felony. The present prisoner, George Archer, was at that time out upon bail and did not surrender, but having been arrested early in the present year, he was now tried.

It appeared, that a very violent attack had been made on the prosecutor at Epsom races, by thirty or forty persons, in which he was severely wounded, and that the four before-mentioned persons and the prisoner were concerned in it; but that the prisoner Archer, who was only sixteen years

of age, had not taken so prominent a part in it as the four others who had been convicted of the felony.

The jury found the prisoner Archer Not guilty of the felony, but Guilty of an assault.

Charnock, for the prisoner, submitted that this was equivalent to a verdict of not guilty, as the prisoner was found not guilty of the felony; and on an indictment like the present, one prisoner could not be convicted of *felony, and another of an assault only. He cited the case of *Reg. v. Phelps*, C. & Mar. 180, and *Reg. v. M^r Phane*, Id. 212. [*175]

PATTESON, J.—I will respite the judgment, in order to take the opinion of the judges, whether, upon the same indictment for feloniously cutting and wounding against several persons, one may be found guilty of felony, and another of misdemeanor.

Clarkson, for the prosecution.

Charnock, for the prisoner Archer.

In the ensuing term, the case was considered by the judges, and their lordships were of opinion, that the conviction of the prisoner Archer of an assault under the stat. 7 Will. 4 & 1 Vict. c. 85, s. 11, was right.(a)

(a) In the case of *Rex v. Turner and Others*, 1 Sid. 171, it appears to have been doubted by the two chief justices, Foster and Bridgeman, whether one person could be convicted of burglary and stealing, and another of stealing only, on the same indictment; but in the case of *Rex v. Salisbury and Others*, Plowd. 100, it was held, that, on an indictment for murder, one may be found guilty of manslaughter, and the rest of murder; so in the case of *Rex v. Butterworth and Others*, R. & R. C. C. 520, it was held, that, on an indictment for burglary and larceny against two, one may be found guilty of the burglary and larceny, and the other of the larceny only.

*HERTFORD SUMMER ASSIZES, 1843. . [*176

BEFORE BARON PARKE.

REGINA v. MARY ANNE DRAPER.

A. was indicted for administering poison to B., with intent to murder her. A. took a tea-pot and tea-cup into B.'s bed-room, and left it there, and B. afterwards helped herself to a cup of the tea which contained the poison. The jury found A. guilty of administering the poison, but not with intent to murder:—*Held*, that the offence of administering poison in this manner, with intent to murder, was not one in which "the crime charged" includes an assault within the stat. 7 Will. 4 & 1 Vict. c. 85, s. 11.

INDICTMENT on the stat. 9 Geo. 4, c. 31, s. 11.—The first count of the indictment charged that the prisoner, on the 2d of April, 1843, did administer to Mary Day a certain deadly poison, called oxalic acid, with intent to murder her.

It appeared that, on the night of Saturday, the 1st of April, 1843, Mrs. Day had accused the prisoner, who was her servant, of stealing a table-cloth; and that, it being Mrs. Day's custom to take her breakfast in bed, the prisoner, on the morning of Sunday, the 2d of April, brought to her, into her bed-room, the tea-pot and a cup and saucer, *and there left them, and went down stairs*; and that, on Mrs. Day's having *helped herself* to some of the tea from the tea-pot, she found that it had an acid taste, and, on its being analyzed, it was found to contain oxalic acid.

Dowling, Serjt., for the prisoner, addressed the jury, and contended that there was no sufficient proof of an intent to murder.

The jury found the prisoner "Guilty of administering the poison, but not with intent to murder."

PARKE, B.—That is tantamount to a verdict of Not guilty.

Ryland and *Lydekker*, for the prosecution, submitted that the prisoner *177] might be convicted of an assault under "the 11th section of the stat. 7 Will. 4 & 1 Vict. c. 85,(a) and cited the case of *Regina v. Bullock*, 8 C. & P. 660.

PARKE, B., (having conferred with TINDAL, C. J.)—We are of opinion that the offence of administering poison in this manner, with intent to murder, is not one in which "the crime charged" includes an assault.

Verdict—Not guilty.

Ryland and *Lydekker*, for the prosecution.

Dowling, Serjt., for the prisoner.

(a) Set forth 8 C. & P. 656, n.

ESSEX SUMMER ASSIZES, 1843.

(Civil Side.)

BEFORE BARON PARKE.

DAVIS v. CLARKE.

A bill directed in blank may be accepted by anybody, and be a good bill; but, if directed to a particular person, it cannot be accepted by any other person, except for honour.

ASSUMPSIT by the plaintiff as endorsee against the defendant as the acceptor of a bill of exchange, dated the 8th of March, 1838, for £100, drawn by John Hart, alleged to be accepted by the defendant, and endorsed by John Hart to the plaintiff.

Pleas, first, a denial of the acceptance; and second, the discharge of the defendant under the Insolvent Debtors' Act.

The bill was accepted by the defendant in the ordinary form, by his writing across it the word "accepted," and his name; but it was directed at the foot, not to the defendant, but "*To Mr. John Hart.*" It did not appear who "*Mr. John Hart*" was, except that the drawer had the same name.

*178] *Thesiger*, for the defendant, objected that the bill, not being directed to the defendant, could not be accepted by him within the meaning of the issue on the first plea.

Petersdorff, for the plaintiff.—It does not lie in the defendant's mouth to raise this objection, after taking to the bill, and accepting it in the usual form. He cited the case of *Gray v. Milner*. (a)

(a) In that case an instrument was drawn, payable to the drawer or his order, and was made payable at No. 1, Wilmot street, without being addressed to any person by name, and was afterwards accepted by the defendant; and it was held that he was liable in an action on this instrument as a bill of exchange; and Lord Chief Justice Dallas stated, "that it was not necessary that the name of the party who afterwards accepted the bill should have been inserted, it being directed to a particular place, which could only mean to the person who resided there; and that the defendant, by accepting it, acknowledged that he was the person to whom it was directed."

PARKE, B.—This bill is wrong. A man cannot accept a bill not drawn upon him, except for honour. There was a case in the Exchequer Chamber,—a criminal case,—in which the judges held, that a bill directed in blank may be accepted by anybody, and be a good bill; but when directed to a particular person, nobody but the person to whom it is directed can accept the bill, except for honour.

Petersdorff then applied for leave to amend.

PARKE, B.—If I allow an amendment, the cause must stand over to the next assizes, with leave to plead *de novo*. But you cannot amend with effect, inasmuch as this is evidently not an acceptance for honour. The plaintiff must be called.

Petersdorff, for the plaintiff.

Thesiger, for the defendant.

*WELSH CIRCUIT.

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GLAMORGANSHIRE SUMMER ASSIZES, 1842.

BEFORE BARON ROLFE.

REGINA v. JOHN HARRIS and EVAN LLOYD.

A benefit club, called the Urgant Lodge of Odd Fellows, whose funds were raised by contributions of the members, had deposited two sums with the Brecon Bank, who had given the usual bankers' receipt, but the bankers were directed not to pay the money, except to the order of the committee of the club. The prisoners, who were members of the club, got possession of the receipts, and, with them, presented to Mr. E., one of the bankers, a forged paper purporting to be an authority to the bearers to receive money signed by three officers of the club, called noble-grand, vice-grand, and secretary, and sealed with the lodge seal; and Mr. E., who paid the prisoners the money, proved that he would not have done so on the production of the receipts only without this paper. The prisoners were convicted on an indictment for forging and uttering this paper, which in some of the counts was described as a *warrant*, and in others as an *order* for the payment of money; and the fifteen judges held the conviction right.

FORGERY.—The first count of the indictment charged the prisoners with having forged a certain *warrant for the payment of money*, which was in the following words:—

“Urgant Lodge, Hirwann, 14th March, '42.

“As we have had a place which will return more interest on our cash, with good security, the bearers are authorized to apply for the same. In witness whereof we subscribe our names, and affix the seal of our lodge.

“N. G. DAVID DAVIES.

“V. G. DAVID LLOYD.

“Sec. WM. LEWIS.”

With intent to defraud David Evans and others. In the second count, the instrument was called an “order for the payment of money.” In other

counts the intent was laid to be to defraud David Davies and others. There were also counts for uttering; and also another set of counts, in which the instrument was described as having, in addition to the names set out above, a seal, containing the words, "Urgant Lodge, Hirwann," encircling two closed hands.

*180] It appeared in evidence that David Evans, and four other *persons, carried on business in partnership together, as bankers, under the firm of the Brecon Bank; and it also appeared that David Davies and a number of other persons, including the prisoners, were members of a benefit club, called the Loyal Urgant Lodge of Odd Fellows; and that David Davies held an office in the club, called Noble-Grand; and that David Lloyd held an office in the club called Vice-Grand. The funds of the club had been raised by the contributions of the different members; and it further appeared that the club, at different times, deposited two sums of money with the Brecon Bank, the one a sum of £105, and the other a sum of £25, for which sums the bank gave common bankers' receipts; and, by the desire of the depositors, they wrote across the receipts the names of six persons, who were represented to them (the bankers) as being the committee; and the bankers were directed not to pay the money mentioned in the receipts, except to the order of the committee or of the club. The receipts were kept with certain cash belonging to the club, in a box with two locks, the key of one lock being kept by David Davies, as Noble-Grand, and the key of the other lock by an officer called deputy-treasurer.

The prisoners got possession of the box and its contents, including the two receipts; and on the 19th of March, 1842, they presented the receipts at the Brecon Bank, together with a paper writing, corresponding exactly with that set out in the indictment, and having a seal affixed also corresponding with that mentioned in the indictment. The letters N. G. and V. G. were proved to mean Noble-Grand and Vice-Grand, but the name of the secretary was proved to be William Jones, and not William Lewis; and it was proved that the prisoners, upon producing the receipts and the paper, desired to have the £130, and that Mr. Evans, one of the partners of the bank, considering the paper produced to be an authority from the club, paid the money to the prisoners. And Mr. Evans further stated, that *181] he should not have paid the money on the receipts alone *without the paper, nor on the paper without the receipts. The signatures, David Davies, David Lloyd, and William Lewis, were all forged.

E. V. Williams, for the prisoners, submitted that this paper was neither a warrant nor an order for the payment of money; and even if it were, yet that the prisoners, being members of the club, could not be convicted of forgery.

ROLFE, B.—I will reserve the case for the consideration of the fifteen judges.

Verdict—Guilty.

W. M. James, for the prosecution.

E. V. Williams, for the prisoners.

The case was afterwards considered by the fifteen judges, who held the conviction right.

DENBIGHSHIRE SUMMER ASSIZES, 1843.

BEFORE BARON GURNEY.

REGINA v. JOHN JONES.

A. was charged with drowning a mine, which, in the first count of the indictment, was laid to be the mine of "J. P. and others;" in the second count, as the mine of "J. D. C.;" and in the third as the mine of "R. R." J. P. and his two brothers were the lessees of the mine, but left off working it a few days before the offence, when R. R. worked it, and his name was put on the carts instead of the name of P. R. R. stated that he worked the mine for the benefit of J. D. C., who was trustee for the North and South Wales Banking Company under a deed. No deed was proved at the trial. A. was convicted, and the judges held the conviction right.

Seem, that there was evidence to support each of the three modes of laying the property.

INDICTMENT on the stat. 7 & 8 Geo. 4, c. 30, s. 6.(a) The first count of the indictment charged that the prisoner, on the 21st day of May, 6 Vict., at the parish of Raubon, "feloniously, unlawfully, and, maliciously, did [*182 cause a large quantity of water to be conveyed into a certain mine of coal of *John Pickering and others*, his partners there situate, with intent thereby then and there to damage and destroy the said mine against the form of the statute," &c. Second count the like, stating the mine to be a mine of coal of *John Dean Case*. Third count the like, substituting the name of *Robert Roberts* for that of *John Dean Case*. Fourth, fifth, and sixth counts, for feloniously, unlawfully, and maliciously causing "a large quantity of water to be conveyed into certain subterraneous passages communicating with a certain mine called the Cefn mine," laying the property as in the first, second, and third counts. There were six other similar counts laying the intent to be "to hinder and delay the working of the said mine."

The evidence clearly proved the offence, and the only question in the case was, whether the property in the mine was well laid. The offence was committed on the 21st of May, 1843, and Mr. John Pickering and his two brothers were lessees of the mine in question, and had worked it until the 11th of May, 1843. They had borrowed £20,000 of the North and South Wales Bank, and upon the 11th of May, Mr. Robert Roberts, acting for that bank, took possession of the mine, (it did not appear whether in pursuance of any deed or judgment,) and the name upon the carts was altered from that of Pickering to that of Robert Roberts, and from that time the mine was worked by Mr. Robert Roberts; and Mr. Roberts stated in his evidence in chief, that he was put into possession of the mine by Mr. Mallaby, *as attorney for the bank*; but in his cross examination, he explained that to be *as attorney for Mr. John Dean Case*, who, he said, was trustee for the company; and being asked whether by deed, answered in the affirmative; and he also added that he had, since the 11th of May, 1843, worked the mine for the benefit of Mr. Case.

Jervis and Welsby, for the prisoner, submitted that the *property [*183 in the mine was not proved as laid in either of the counts of the indictment. 1st. That the first count failed, because the Messrs. Pickering were out of possession of the mine. 2d. That the second count was not

(a) See the case of *Regina v. James*, 8 C. & P. 131.

proved, as there was no legal evidence of the property in Mr. John Dean Case; and 3d. That the possession of Mr. Robert Roberts, as agent for the North and South Wales Bank, was not such a possession as would sustain the third count of the indictment, he being merely the agent or servant of the company, and that a co-partnership of this description (the North and South Wales Bank) must have a registered officer, and that the property should, therefore, have been laid in him.

GURNEY, B., reserved the case for the opinion of the fifteen judges.

Verdict—Guilty.

Hill and Townsend, for the prosecution.

Jervis and Welsby, for the prisoner.

Before Lord DENMAN, C. J., TINDAL, C. J., Lord ABINGER, C. B., PARKE, B., GURNEY, B., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., ERSKINE, J., MAULE, J., ROLFE, B., and WIGHTMAN, J.

Jervis, for the prisoner. It is not material to consider in the present case whether the allegation as to the property of this mine was necessary or not, because as the mine is alleged to be the mine of particular persons, it must be proved to be so. With respect to the first count laying the property in the Messrs. Pickering, it is not enough to lay the property in those who have the legal estate in the mine. In a case of burglary, it would not be sufficient to lay the property of the house to be in a person who had the legal estate in it, but had left the possession of it. *With respect
 *184] to the counts laying the property in Mr. Roberts, they are equally unsupported. Mr. Roberts was the agent and servant of the North and South Wales Bank, or of Mr. Case, and, therefore, the property cannot be properly laid in him. In the case of *Rez v. Hutchinson*, R. & R. C. C. R. 412. it was held that the chandelier of a dissenting chapel, vested in trustees, could not be described as the property of a servant who had merely the care of the chapel, and the things in it, to clean and keep them in order, although he had the key of the chapel, and no person, except the minister, had another key; and with respect to the second count, I apprehend that the effect of the evidence is, that Mr. Case was in possession, as agent of the North and South Wales Bank, under some deed. It is not suggested that he was a shareholder in the bank, and if he were so, the indictment would not be good under the stat. 7 Geo. 4, c. 64, s. 14, as the property is not laid in Mr. Case, and others, and if the North and South Wales Bank had public officers under the stat. 7 Geo. 4, c. 46, the property ought to be laid in them as in the case of *Steward v. Grenves*, 10 M. & W. 711, it was held that the creditors of a company established and carrying on business under the provisions of the stat. 7 Geo. 4, c. 46, and having a public officer, have no remedy against the individual members as at common law; and that the words of the 9th section of that statute, that "all actions against the co-partnership shall and lawfully may be commenced, instituted, and prosecuted against one or more of the public officers nominated as before mentioned as the nominal defendant," are obligatory.

COLERIDGE, J.—Does that apply when the bank has not issued notes?

PARKE, B.—It appears that Mr. Case was in possession by his servant, Mr. Roberts; but there is nothing to take the property out of the first lessees.

*185] *Lord ABINGER, C. B.—It appears that the mine is worked on account of Mr. Case, but I should think that Mr. Roberts having

his name on the carts would be some evidence, at least, that he was working the mine.

Townsend, for the prosecution, was not heard.

The case was considered by the judges, who held the conviction right.

CENTRAL CRIMINAL COURT.

MAY SESSION, 1842.

BEFORE MR. BARON ALDERSON AND MR. JUSTICE COLTMAN.

REGINA v. MARY GOOD.

Where a woman is charged with comforting, harbouring, and assisting a man who had committed a murder, if the counsel for the prosecution has reason to believe that the woman was married to the man, and it appears clearly that she considered herself as his wife, and lived with him as such for years, he will be justified in not offering any evidence against her, even though he have also reason to believe that the marriage was in some respects irregular and probably invalid.

THE prisoner was arraigned on an indictment which charged one Daniel Good with the wilful murder of Jane Jones, otherwise Jane Good, and charged the prisoner with comforting, harbouring, and assisting the said Daniel Good, knowing that he had committed the said murder. (a)

Sir *F. Pollock*, A. G., in opening the case, said—I understand that the defence is, that the prisoner was married to Daniel Good, and the law says, that in all cases, except treason, it is no offence in a wife to comfort and assist her husband. The counsel for the prisoner has communicated to me the circumstances relating to the marriage, and I think *it is [*186 very probable that some marriage did take place in the kingdom of Ireland, at a place where the registers were very imperfectly kept. There is no doubt that Daniel Good and the prisoner for many years considered each other as man and wife; and, under these circumstances, though it might be difficult for the prisoner to prove a marriage in fact, I do not intend to offer any evidence on the part of the prosecution.

ALDERSON, B., to the jury.—No evidence being offered in this case, it is your duty to acquit the prisoner. Persons charged with such an offence, ought to know that it is a very serious offence to afford any assistance to a criminal, so as to obstruct the course of public justice. But a wife is in a peculiar situation: she cannot be found guilty of comforting and assisting her husband. And if the prisoner in this case went through the ceremony of marriage, and it should have turned out that there was some irregularity in the marriage, nevertheless, if it appeared that she had acted under the supposition that she was the wife of Daniel Good, and according to the duty which she considered to be cast upon her, the court would have felt it right to have inflicted a very slight punishment upon her. I think, therefore, that the attorney-general has only acted consistently with the

(a) Daniel Good had been tried and found guilty of the murder on the day before.

duties of his high office in taking the course which he has taken, and which the court entirely approves. Verdict—Not guilty.

Sir F. Pollock, A. G., *Adolphus, Waddington, and R. Gurney*, for the prosecution.

Ballantine, for the prisoner.

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AUGUST SESSION, 1842.

BEFORE BARON ROLFE.

REGINA v. SARAH STROUD.

An indictment for the murder of an illegitimate child, a month old, in the first count, described the child as Harriet Stroud; and in the second, as "a female of tender age, whose name is to the jurors aforesaid unknown." It was proved that the child was baptized Harriet, and was so called, but there was no evidence that the child had ever been called Harriet Stroud:—*Held*, that the prisoner could not be convicted on either of these counts, as the child clearly had the name of Harriet, though not that of Stroud; and that, in order to sustain the second count, there must be evidence showing that the name of the child could not reasonably have been supposed to be known to the grand jury.

MURDER.—The prisoner was indicted for the murder of her female child, by drowning her. The indictment consisted of two counts. In the first count, the child was described as Harriet Stroud, and in the second count the child was described as "a female of tender age, whose name is to the jurors aforesaid unknown."

It appeared by the evidence, that on the 16th of June, 1842, the prisoner, being a single woman, gave birth to a female child in St. Pancras workhouse, and that the child was called "Harriet," and was baptized by that name on the morning of the 16th of July. No copy of the register was given in evidence, but it was proved by one of the witnesses, that the child was baptized by the name of "Harriet" only, and not "Harriet Stroud;" and there was no evidence that the child had ever been called by any name, except Harriet.

It was further proved, that, on the evening of the 16th of July, the prisoner left the workhouse with the child, and immediately proceeded to the Regent's Canal, and there drowned the child. Verdict—Guilty.

Prendergast and Thomas, for the prosecution.

Doane, for the prisoner.

ROLFE, B.—Ordered the judgment to be respited, his lordship being of opinion, on the authority of the case of *Reg. v. Waters*, 7 C. & P. 250, that *188] the prisoner could not be convicted on the first count of the indictment, and that there should have been a count for the murder of a child named "Harriet," and his lordship reserved the case for the opinion of the fifteen judges on the question, whether the prisoner ought to have been convicted on the second count.

In the ensuing term, the case was considered by the judges, who held the conviction wrong, their lordships being of opinion, that in order to sustain a count for the murder of a child whose name is to the jurors unknown, there must be evidence showing that the name could not reasonably have been supposed to be known to the grand jury, and that here the child clearly had the name of "Harriet."(a)

(a) See the case of *Regina v. Campbell*, ante, p. 82.

REGINA v. STRINGER and NEWSTEAD.

A. and B., on a concerted plan to obtain money from C., threatened to accuse him of an indecent exposure of his person, and A. (B. being present) seized C. by the collar, and A. and C. went to a station-house, and there A. made the threatened charge:—*Held*, that, on these facts, A. and B. might be convicted of an assault with intent to rob C., although the threats used did not come within the terms of the stat. 7 & 8 Geo. 4, c. 29, ss. 7 & 9, or of the stat. 7 Will. 4 & 1 Vict. c. 87, s. 4.

ASSAULT, with intent to rob.—The indictment charged the prisoners with having assaulted John Ellis Churchill, with intent to rob him, and charged that the prisoner Stringer had been previously convicted of felony.

It was proved by Mr. Churchill, the prosecutor, that on the morning of the 11th of August, 1842, he was walking in Hyde Park, at a little after nine o'clock, when he was accosted by the prisoner Newstead, who asked him the nearest way to the city. The prosecutor told him the best way was to go straight on, which would take him to Cumberland-gate. The prisoner Newstead then said he had lost his way, having been passing the day at Kensington. Almost immediately after this had occurred, the prisoner Stringer came up from behind, and seized the prosecutor by the collar, and said to him, "You damned beast, you have been indecently exposing your person; I have been *watching you with your friend [*189 (pointing to the prisoner Newstead) for three quarters of an hour." The prisoner Stringer then forced the prosecutor to go with him to a police-station, the prisoner Newstead accompanying them during a part of the way, but leaving them before they got to the station. At the station the prisoner Stringer repeated the charge which he made when he first seized the prosecutor, and added that the private parts of both the men were exposed; that one had his arms round the neck of the other, and each of them had hold of the private parts of the other. The whole of this charge was a fiction, and many circumstances were given in evidence to show that the whole was a preconcerted plan between the two prisoners, for the purpose of extorting money from the prosecutor. No money, however, was given.

ROLFE, B., in summing up, told the jury that, if the prisoner Stringer was acting in pursuance of a previous plan arranged with the prisoner Newstead, with a view to induce Mr. Churchill to give him money, in order that he might escape the annoyance attending such a charge, that was an assault with an intent to rob, and would warrant them in finding both the prisoners guilty on this indictment.

The jury found both the prisoners guilty.(a)

Clarkson and Bodkin, for the prosecution.

The learned Baron afterwards reserved the case for the opinion of the fifteen judges on the question, whether the conviction could be sustained, as the subject of the charge made by the prisoner Stringer against Mr. Churchill did not come within the terms either of the stat. 7 & 8 Geo. 4, c. 29, ss. 7 and 9, or the stat. 1 Vict. c. 87, s. 4; but the case [*190 having been considered by the fifteen judges, their lordships held the conviction right, as there was actual violence and an attempt to extort money by means of that violence combined with threats, which might be reasonably supposed calculated to induce the party assaulted to part with his money through fear of the charge.

(a) See the cases of *Reg. v. Norton*, 8 C. & P. 671, and *Reg. v. Henry*, 9 C. & P. 309.

OCTOBER SESSION, 1842.

BEFORE MR. JUSTICE MAULE AND MR. JUSTICE ERSKINE.

REGINA v. ELLEN CONNELL.

A person was indicted for uttering a counterfeit coin, intended to resemble and pass for "a groat." All the witnesses for the prosecution, except the inspector of coin for the Mint, called it a *fourpenny piece*. The inspector called it a groat, and said he believed that it had had that name from the earliest period. He added, that the original groat of Edw. 3d's reign was larger and heavier than the coin in question; and that, in the queen's proclamation, these coins were called both groats and fourpenny pieces. The proclamation was not produced, and the inscription on the coin itself was "*fourpence* :—*Held*, that if the jury, from their own knowledge of the English language, without considering any evidence at all, were of opinion, that a groat and fourpenny piece were the same, the prisoner was rightly indicted and might be convicted.

THE prisoner was indicted for felony in uttering, after a previous conviction, a piece of false and counterfeit coin, resembling and apparently intended to resemble, and pass for a piece of the queen's current silver coin called a *groat*, well knowing the same to be false and counterfeit, &c.

The witnesses who proved the uttering, &c., all called the coin by the name of a *fourpenny piece*; but Mr. Field, the inspector of coin to the mint, having said that *the groat* was counterfeit, was asked, on cross examination, "What do you call this coin?" He replied, "*A groat*—it has had that name, *I believe*, from the earliest period; it has the words 'fourpence' on it, but the original name was groat, in the time of Edward the Third: they were not then the same size and weight as this." On re-examination he was asked, "Have you heard them called groats?" and his reply was, "Yes, they are called groats as well as fourpenny pieces in the proclamation."

*191] For the prisoner, it was contended, that the coin was not proved by legal evidence to be a groat, the proclamation not having been produced, and the words "fourpence" being stamped upon it, as well as its being called a fourpenny piece by all the witnesses with the exception of Mr. Field.

MAULE, J., (ERSKINE, J., being present,) in summing up, said—"A groat" is a common word belonging to our own mother tongue, such as "uttering," "public-house," half-pint," and many other expressions: and you are here as Englishmen to use your knowledge of your own language; and if, understanding the matter without any evidence, you are satisfied that a fourpenny piece and a groat are the same thing, then the prisoner is rightly indicted. It is very true that a groat in Edward the Third's reign weighed a great deal more than a fourpenny piece does now—and so it is with respect to other coins. Things have kept their names, though they have changed their value.

Verdict—Not guilty

Bodkin and *Espinasse*, for the prosecution.

Payne, for the prisoner.

*DECEMBER SESSION, 1842.

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BEFORE THE HONOURABLE C. E. LAW, RECORDER.

REGINA v. PETER ADAMSON.

A. was indicted for obtaining £200, by falsely pretending that he had obtained from Lord S. the appointment of emigration agent at P., which was worth £600 a year; and that for £200 he would give the prosecutor one-third of the agentship. The prosecutor proved that he gave the money on this pretence, which was false; but that, before he parted with his money, the defendant prevailed on him to execute a deed of co-partnership with him, in which the consideration was stated to be £200, and in which nothing was said of the agentship, or how it was obtained:—*Held*, that the putting in of this deed on the part of the prosecution did not exclude the parol evidence of the false pretences; and that if the deed was a part of the defendant's scheme to effect the fraud, the defendant should be found guilty.

FALSE pretences.—The indictment charged that the defendant did unlawfully falsely pretend to one John Heron, that he, the said Peter Adamson, had obtained from Lord Stanley the appointment of emigration agent at Port Philip, which was a situation worth £600 a year, and that for £200 he would give John Heron one-third of the emigration agentship; and that he, the said John Heron, would be sure to have back his £200 out of the emigration agentship the first year, and by means of which false pretence he obtained £200 from John Heron, with intent to cheat him of the same. The indictment then went on to negative the false pretences in the usual manner.

It was proved by the prosecutor and his witnesses, that the defendant obtained the money by means of the pretences stated in the indictment, and the averments negating the truth of the pretences were clearly proved; but it also appeared in evidence that the defendant had urged the prosecutor to become his partner, and engaged that if the prosecutor accepted his proposal of a partnership, and advanced the £200 as a bonus, the prosecutor should have a third share of the emigration agentship, *and of the other business*, that he (the defendant) would have in the colony; and that, on the prosecutor expressing a wish to write to consult his friends in Scotland, the defendant refused to allow him to do so, and also refused to allow him to consult his cousin in London, or any one else, on the subject of the proposed partnership, and it was proved by the prosecutor that he was induced to accept the proposal of the partnership on the assurance of the defendant that he then had the appointment of [*193 emigration agent. It further appeared, that after the false pretences stated in the indictment had been made, and before the prosecutor parted with his money, a partnership deed was, at the defendant's instance, prepared by the defendant's solicitor, and executed both by the prosecutor and the defendant, but it also appeared, that the defendant had previously promised, that, on the drawing up of the deed of partnership between them, he would show the prosecutor the letter from Lord Stanley appointing him (the defendant) emigration agent.

The partnership deed was put in, and the consideration for the partnership was there stated to be £200, but no mention was made of the emigration agency, or of the representations of the defendant in respect thereof

Prendergast, for the defendant, objected that as the deed did not contain the pretences stated in the indictment, but on the contrary, represented the £200 to be given in consideration of a general partnership between the defendant and the prosecutor, and as the prosecutor had put in the deed as part of his case, the parol evidence of the false pretences ought to be rejected, and the jury ought to be directed to acquit the defendant. He cited the case of *Rex v. Codrington*, 1 C. & P. 661.(a)

LAW, Recorder.—I cannot withdraw the case from the consideration of the jury upon this objection.

Prendergast addressed the jury for the defendant.

*194] *LAW, Recorder, (in summing up.)—If you are satisfied that the prosecutor in fact parted with his money on the pretences laid in the indictment, and that the preparation of the partnership deed, and the execution of it, were part of the prisoner's scheme to effect the fraud, you ought to find him guilty.

Verdict—Guilty.

Clarkson and *Doane*, for the prosecution.

Prendergast, for the prisoner.

The learned Recorder reserved the case for the opinion of the fifteen judges, on the question whether, under the circumstances, upon the production of the deed as part of the prosecutor's case, the parol evidence ought to have been rejected, and the jury directed to acquit the prisoner. In the ensuing Easter term, the case was considered by the judges, who held the conviction right.

(a) In that case it was held, that if one professes to sell an interest in property and receives the purchase-money, the vendee taking the usual covenant for title, and it turns out that the vendor has, in fact, previously sold his interest in the property to a third person; this is not sufficient to support an indictment for obtaining money by false pretences.

*195]

*FEBRUARY SESSION, 1843.

BEFORE MR. COMMON SERJEANT MIREHOUSE.

REGINA v. JAMES WILLIAMS.

Overtures were made by a person to the servant of a publican, to induce him to join in robbing his master's till. The servant communicated the matter to the master, and some weeks after, the servant, by the direction of the master, opened a communication with the person who had made the overtures, in consequence of which he came to the master's premises. The master having previously marked some money, it was, by his direction, placed upon the counter by the servant, in order that it might be taken up by the party who had come for the purpose. It was so taken up by him:—*Held*, larceny in such party.

The prisoner was indicted for stealing, on the 9th of January, four shillings of the moneys of William Michael Davis.

The prosecutor, Davis, was a publican, keeping the Blue Posts, in Berwick-street. A witness, named Lincoln, was called for the prosecution, and said,—“I am in the service of Mr. Davis. I had been there seven months. I had been there when a man named Ashton was barman. He went away in October. I had seen the prisoner there during the time Ashton was there. I met him going up Broad-street, nearly three months before he was taken into custody, at the latter end of October. He asked

me if I wanted any money 'worked' for me. I said, 'No; I did not want any.' He said, 'It would be a great deal to my interest if I worked any.' I said, 'No; I never worked any, and did not wish to have any worked for me;' that was what I said to him at that time, and we parted. I had heard 'worked money' spoken of by my master, and had read about it in the newspaper. I communicated to my master what had passed between me and the prisoner. About six weeks after my first conversation, the prisoner came to my master's house: my master was in the bar at the time; he did not say any thing then. On the 5th of January, *my master gave me directions*, in consequence of which I went to Lambeth-square, New-cut, where I thought I could find the prisoner. He was not in the way, and *I wrote this note by my master's direction, and left it for him—* *['Mr. Williams will greatly oblige me by calling on me, at Mr. Davis's, Blue Posts, Berwick-street, as I have got a little business [*196 for you to do for me upon what you spoke to me about a little while ago.'] I left it about five in the evening. About half-past seven, he and his wife came to my master's house. I saw them outside the door. The prisoner came and patted me on the shoulder. I said I did not expect to see him down so soon. He said directly he got the note he came down. I asked if he could come on Saturday evening. He said, perhaps I could give him something that evening. I said he could come in if he liked. He came in, and bought some liquor with a sixpence. I gave him the proper change. He came a second time the same evening. I drew him a glass of liquor. He put down a shilling and said, 'On to it now!' I did not give him any more money than he was entitled to then. On the following Sunday I saw him in the street, and walked with him along Compton-street, and down Covent garden market into the Strand. I went to the Red Lion there, and had a conversation with him about Ashton. An arrangement was made between me and him, that he was to come down that evening, and come in once or twice in the evening, and I was to give him what I could each time. He said he was to put down a shilling; I was to take it up, make a pretence of putting it into the till, take out two or three more and place it on the counter, and he was to take it up; and if he was to come in again, I was to rub my arm; if not, I was to put out my finger. I told my master all that had passed. The prisoner came in twice during that evening. On the Monday he was to come again. I saw *some money marked and put into the till*. He came between seven and eight in the evening. *An officer was sent for*. The officer had arrived when the prisoner first came in that evening. I did not give him any money the first time. He came in again, and bought a pennyworth of gin. *He put down a shilling. I then gave him four marked shillings, the shilling he gave me, and threepence *halfpenny. Directly my hand was off it, he took it off the counter and put it into his right-hand pocket, and was going* [*197 to walk off with it, when he was seized by the officer."

The evidence of Mr. Davis was as follows:—"I am Lincoln's master. In consequence of information from him, I marked ten shillings on Monday the 9th of January, and put them into the till. Some of them were afterwards produced to me by Beresford the officer. *Lincoln had previously made communications to me, on the prisoner's propositions to him. He acted in this with my knowledge and consent, and by my directions. I gave him directions to give the prisoner the money in the way he has done. I do not recollect that I told him to write the letter, but I told him to call upon the prisoner and renew the connection.*"

Prendergast, for the prisoner, contended that, under the circumstances detailed in the evidence, the offence of larceny had not been committed by the prisoner.

Payne and *Bodkin*, for the prosecution, argued that it was just as much a trespass and a felonious taking in the prisoner, as if the money had not been delivered to him by the servant by previous arrangement, and with the consent of the master.

MIREHOUSE, C. S., entertained doubt upon the subject, but left the facts to the jury, who found the prisoner Guilty.

Judgment was respited, that the opinion of the judges might be taken upon the question.

The conviction was afterwards held right, and the prisoner received sentence of imprisonment for one year.

Payne and *Bodkin*, for the prosecution.

Prendergast, for the prisoner.

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*MARCH SESSIONS, 1843.

BEFORE THE HON. C. E. LAW, RECORDER, AND MR. COMMISSIONER BULLOCK.

REGINA v. JOSHUA JONES ASHLEY.

A member of a club was indicted for stealing some of the plate used at the club-house. The house-steward slept in the house, and he stated, that he had the charge of all the plate, and was responsible for it; but it appeared that the plate was delivered every night to the under-butler, who was appointed by the club; and by him placed in a chest in the pantry. The indictment described the property as the goods of the house-steward, and alleged it to have been stolen in his dwelling-house:—*Held*, that upon the evidence, it was wrong in both respects, inasmuch as his sleeping in the house was only as a servant of the club; and his alleged responsibility was not coupled with any custody of the property, either by himself or by his own servants.

THE prisoner was indicted for stealing, on the 14th of February, four spoons, value £4, and one fork, value £1, of the goods of Thomas Howse, in his dwelling-house.

The property mentioned in the indictment was lost from a table in a room in the house of the Junior United Service Club. The prisoner, who was a member of the club, was shown to have been in the room about the time when the spoons and fork were placed on the table; and it appeared that on the 15th of February, the day after they were lost, he took the spoons to a person named Bullen, and gave him directions to engrave upon them the initials "J. J. A."

John Howse was called as a witness for the prosecution, and said, "I am house-steward to the Junior United Service Club. *I live at the house, and sleep in it.* I have the *charge of all the plate, and am responsible for it.*" He further said, "I have nothing to do with the rules. I neither prepare them, nor act on them, except in the preservation of the property. I have the custody of the plate, and am responsible for its safety. *I am appointed by the committee.* There are minutes kept of my appointment." The witness was then asked the following question by the court, viz., "Plate had been missing before—were you on those occasions called upon to make it good?" In reply, he said, "I am liable to do so, and have done so. I was called on to make good some missing plate, and I acquiesced in it,

and made it good. The last time was on a robbery of the *plate in May last; and here is the receipt. I think I made it good in [199 June. It was long before any charge against the prisoner; he was then a member of the club. I paid 11*l.* 14*s.* In consequence of this being thought to be a robbery, I was allowed to make a levy generally upon the servants. Every servant paid a portion; mine was an equal share with the rest. All the servants in the establishment contributed. The committee looked to me to pay it, but authorized me to make all pay a part, thinking it was a robbery by a servant, to make us all careful. *After the business of the club is over, the plate is delivered into the care of the under-butler overnight. It is not put into a chest in his room, but in a regular strong closet in the pantry. The under-butler is appointed by the club.* There is no instance of plate being missed, not supposed to be taken by the servants, which I have made good. The plate is generally looked over every night, and generally three times a day; that which is in use. It is checked by a plate-book by the two under-butlers. I do not check it."

It appeared that the house-steward gave a bond to the club, but it was not produced in evidence, nor were the terms of his appointment by the committee proved.

Prendergast, for the prisoner, submitted that the evidence did not support the indictment.

LAW, Recorder, (after consulting Mr. Commissioner BULLOCK,) said—We think that it is certainly not the dwelling-house of the steward. He holds possession not to exclude, but to admit the members; merely as a servant of the club. The only remaining question will be, whether this was stolen to charge the bailee.

Prenaeergast, for the prisoner.—The principle is very broad. Supposing it to have been taken by a stranger, there would be no case. There was no possession by Mr. Howse at all. The custody is that of the under-butler *rather than that of the steward. If the custody [200 of the plate was not in the steward, then the whole case fails. Then comes the next point. Supposing this case, that the plate was delivered to the steward, his possession is the possession of the club as their servant. The distinction between a servant and a bailee is, that the bailee has a right independent of me, but not so my servant. The servant holds under the direction and for the use of the master. Lord Hale puts this very case. He says, "If a servant who *has merely the care* and oversight of the goods of his master, as, *the butler of plate*, the shepherd of sheep, and the like, embezzle them, this is larceny." Therefore if it had been taken by a stranger, the indictment would be bad, as it lays the property in the servant, and not in the master.

Clarkson.—I admit that the possession is not in the house-steward, but that does not make it wrong to lay the property in him, as he is answerable for it; and that makes him a bailee.

The RECORDER.—Surely that must be coupled with a possession?

Clarkson.—He has a constructive possession. He is a servant of the house, having the charge of the plate.

The RECORDER.—But it is in the custody of the under-butler, who is not subordinate to him, but is independently appointed by the club.

Clarkson.—The possession of the under-butler is the possession of the butler, and the possession of the butler is the possession of the house-steward.

The RECORDER.—We think not. There is no evidence of his appoint-

ment or the terms of the bond he gives. If you could have given evidence of a responsibility, coupled with custody, and delivery over to another, it might *201] further evidence we cannot say. But taking the whole together, we are clearly of opinion that the property is not rightly laid in Howse, the house-steward.

Clarkson.—He swears that he is responsible. I need not prove his appointment or bond.

The RECORDER.—You are using the servant's right as against the master's, and you must show by his appointment or bond what his rights were as against those of his master. Verdict—Not Guilty.(a)

Clarkson and *Bodkin*, for the prosecution.

Prendergast, for the prisoner.

(a) The prisoner was convicted on a charge of stealing plate from a club, of which he was not a member, and, there being several other indictments against him, was sentenced to be transported for seven years.

APRIL SESSION, 1843.

BEFORE MR. JUSTICE CRESSWELL.

REGINA v. JOHN FITZGERALD and Others.

Semble, that a trial for felony may be postponed on application by the prisoner on sufficient cause shown by affidavit, after the jury have been charged with the indictment and before any evidence has been given in the case.

THE prisoners were indicted for highway robbery, accompanied by violence.

*202] After the jury had been charged with the indictment, *but before any evidence had been given, the prisoner Fitzgerald applied to have his trial postponed.

CRESSWELL, J., at first doubted whether it could be legally done, but after consulting Mr. Justice FOSTER's work on the crown law,(a) his lordship said, that the better opinion seemed to be that it might be done.

(a) Sir John Wedderburn's case, *Fost. Cr. L.* (Oxon. ed. 1762,) p. 22. The report is very long, but the nature of the question which arose, and the decision upon it, may be sufficiently gathered from the following passages in the opinion of Mr. Justice Foster himself, who was one of the judges before whom the question was argued. He says first, "This case hath been very well argued at the bar; but the counsel on both sides went into the general question, touching the power of the court to discharge juries, sworn and charged in capital cases, further than I think was necessary." After making several observations, and referring to several cases on the general question, which he pronounces to be "a point of great difficulty and of mighty importance," and one of those questions which are not capable of being determined by any general rule, he says, "And now I will state what I take to be the present question, and that is, whether, in a capital case, where the prisoner may make his full defence by counsel, the court may not discharge the jury upon the motion of the prisoner's counsel, and at his own request, and with the consent of the attorney-general, before evidence given, in order to let the prisoner into a defence which, in the opinion of the court, he could not otherwise have been let into; and I am clearly of opinion, that a jury may, in such a case, be discharged; and that the discharging the jury, under these circumstances, will not operate so as to discharge the prisoner from any future trial for the same offence. It seems that an opinion did once prevail, that a jury, once sworn and charged, in any criminal case whatsoever, could not be discharged without giving a verdict; but this opinion is exploded in Fer-

*The prisoner produced an affidavit, which was considered not sufficient to support his application. [*203]

Clarkson, for the prosecution, expressed his willingness to consent, if his consent were necessary, to the postponement, on the production of a sufficient affidavit.

Such an affidavit was not, however, produced, and the trial went on, and the prisoners were found Guilty.

Clarkson, for the prosecution.

rar's case, and it is there called a common tradition, which had been held by many learned in the law."

The facts upon which the question arose seem to have been these: the charge was one of high treason against Sir John Wedderburn and several other persons, among whom were Alexander Kinloch and Charles Kinloch. These two prisoners pleaded, at first, not guilty, and their trial came on on the 28th of Oct., 1746. They were then advised to plead to the jurisdiction of the court; but, having pleaded to issue, and the jury being sworn to try the issue, it was said that they were too late. The court, at the request of the prisoners, allowed them to withdraw their plea of not guilty, and the jury were discharged. They were tried on the 29th of October, and convicted, and, afterwards, on being brought up for judgment, alleged that, as a jury had been sworn and charged with them on the 28th, their trial, on the 29th, was a *mis-trial*, and the verdict a nullity. The case was argued before ten judges, viz., two chief justices, the chief baron, Mr. Justice Wright, Mr. Baron Reynolds, Mr. Justice Abney, Mr. Justice Denison, Mr. Baron Clarke, Mr. Justice Foster, and Mr. Baron Clive. All of them, except one, were of opinion that the trial was not a *mis-trial*, and judgment was given against the prisoners as in cases of high treason.

In the case of *Reg. v. Wardle*, (Carr. and Marsh. 647,) where the prisoner was tried for robbery, after one witness had been examined, it was discovered that there was a relation of the prisoner's on the jury. The counsel for the prosecution wished the jury to be discharged; but Erskine, J., after consulting with Tindal, C. J., said that he had no power to discharge the jury, but the case must proceed.

MAY SESSION, 1843.

BEFORE BARON GURNEY AND MR. JUSTICE COLTMAN.

REGINA v. AZZOPARDI.

A British subject who commits a murder in a foreign country upon a person who was not a British subject, is triable in England under the stat. 9 Geo. 4, c. 31, s. 7.

MURDER.—The prisoner was tried under a special commission founded on the stat. 9 Geo. 4, c. 31, s. 7, which authorizes the trial of any of her majesty's subjects who shall be charged in England with any murder or manslaughter committed on land out of the United Kingdom, "whether within the king's dominions or without." The indictment [*204] charged that the prisoner, being a subject of her majesty, had murdered Rosa Sluyk, at Smyrna. In some of the counts of the indictment, the deceased was stated to have been "in the peace of God and our said lady the Queen;" and in others, that allegation was omitted.

It appeared that the murder was committed at Smyrna, and that the prisoner was a native of Malta, of the age of about twenty-one, and was residing at Smyrna under a passport from the governor of Malta. The person murdered was a Dutch woman, and proof was given that Malta is part of her majesty's dominions.

Ballantine, for the prisoner, submitted that it was necessary that the

person alleged to have been murdered should have been a British subject, and should be described as such in the indictment.

GURNEY, B., (having conferred with COLTMAN, J.,) reserved the point for the opinion of the fifteen judges. Verdict—Guilty.

F. Pollock, A. G., Adolphus, and R. Gurney, for the crown.

Ballantine, for the prisoner.

Before Lord DENMAN, C. J., TINDAL, C. J., Lord ABINGER, C. B., PATTESON, J., GURNEY, B., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., MAULE, J., ROLFE, B., and CRESSWELL, J.

Ballantine, for the prisoner.—The killing of a person not a British subject, at a place out of the kingdom, was not murder by the common law. To constitute the crime of *murder at common law, it was *205] necessary that both parties should be British subjects, or, if the subjects of another country, they must be brought, by some circumstances, under British protection, and that is not so in the present case. Lord Coke, 3 Inst. 47, defines murder to be “when a man of sound memory and of the age of discretion, unlawfully killeth, within any county of the realm, any reasonable creature in rerum natura, *under the king’s peace*, with malice aforethought.” By Mr. Serjt. Hawkins, (1 Car. Hawk. bk. 1, ch. 31, s. 3,) murder is defined to be “the wilful killing of any *subject* whatsoever through malice aforethought, whether the person be an Englishman or foreigner.” Taking these definitions together, it is clear that at common law the person killed must be a *subject*, or, as Lord Coke expresses it, “under the king’s peace;” and this view of the case is strongly corroborated by the judgment of the court in the case of *Rex v. Sawyer*, R. & R. C. C. 294, and that case having been decided after the stat. 33 Hen. 8, c. 23, shows that no alteration of the common law was made by that statute as to the party killed; and in the case of *Rex v. Helsham*, 4 C. & P. 394, Mr. Justice BAYLEY directed an allegation that the deceased was a British subject to be inserted in the indictment. I believe that no precedent is to be found of the conviction of a person for murder committed at a place abroad, of one who was not a British subject; and in the case of *Rex v. Depardo*, 1 Taunt. 26, which was the case of a Spaniard who was taken prisoner at sea, and while abroad entered on board an Indiaman, and murdered an Englishman in the Canton river, eighty miles from the sea, no judgment was given, but the prisoner was discharged.

Waddington, for the Crown.—The stat. 9 Geo. 4, c. 31, s. 7, is to be *206] taken as being in *pari materia* with the stat. *57 Geo. 3, c. 53, (a) and it is quite clear that the intention of the stat. 57 Geo. 3, c. 53, was

(a) By which it is enacted, “That from and after the passing of this act, all murders and manslaughter committed, or that shall be committed on land, at the said settlement, in the Bay of Honduras, by any person or persons residing or being within the said settlement, and all murders and manslaughter committed, or that shall be committed in the said islands of New Zealand and Otaheite, or within any other islands, countries, or places not within his majesty’s dominions, nor subject to any European state or power, nor within the territory of the United States of America, by the master or crew of any British ship or vessel, or any of them, or by any person sailing in or belonging thereto, or that shall have sailed in or belonged to and have quitted any British ship or vessel to live in any of the said islands, countries, or places, or either of them, or that shall be there living, shall and may be tried, adjudged and punished in any of his majesty’s islands, plantations, colonies, dominions, forts or factories, under or by virtue of the king’s commission or commissions, which shall have been or which shall here-

to give jurisdiction over murders committed upon persons not British subjects, and the stat. 9 Geo. 4, c. 31, s. 7, only altered the place of the trial. The direction of Mr. Justice BAYLEY as to the indictment in the case of *Rex v. Helsham*, was only *ex majori cautela*.

Ballantine, in reply.—The stat. 57 Geo. 3, c. 53, does not, by any express words, alter the common law; and although the intention of the legislature may have been to provide for the killing of a person not a British subject, yet that is not so expressly enacted. The position contended for on the part of the Crown is contrary to the common law, is not provided for expressly by any act of Parliament, the opinions of able judges are against it, and there is no precedent in its favour; and it moreover seems *repugnant to the ordinary principles of municipal law, [*207 which extends protection only when some duty is exacted.

The prisoner being again brought up at the Central Criminal Court, GURNEY, B., now delivered the judgment of the fifteen judges as follows:—"Upon your trial your learned counsel took an objection to your case being within the act of Parliament upon which you were tried; you a British subject committing a murder in a foreign country, upon a person who was not a British subject. I reserved the point for the consideration of the judges, who have considered it, and they are all of opinion that your case does fall within the statute, and, therefore, that the objection must be overruled. You, a British subject, living under the protection of the British government, are subject to the laws of Great Britain, and you have offended against those laws in the crime you have committed."

Sentence of Death was passed on the prisoner.

after be issued under and by virtue and in pursuance of the powers and authorities of an act passed in the forty-sixth year of his present Majesty, intituled, 'An act for the more speedy trial of offences committed in distant parts upon the sea,' in the same manner as if such offence or offences had been committed on the high seas."

*AUGUST SESSION, 1843.

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BEFORE MR. JUSTICE WILLIAMS AND MR. BARON ROLFE.

REGINA v. BARNARD GREGORY.

The 5th sect. of the 60 Geo. 3 & 1 Geo. 4, c. 4, relating to the trial of misdemeanors, does not require a formal notice to be given by the prosecutor to the defendant, but is intended to prevent his being taken by surprise. Therefore, if it come to the defendant's knowledge twenty days before the next session that the indictment had been found against him at the last session, he is bound to plead and try.

THERE were two indictments against the defendant; one for a libel on the Duke of Brunswick, and another for a libel on an attorney, named Vallance.

Bodkin, who was for the prosecution in the case of the Duke of Brunswick, called the attention of the court to the 5th section of the stat. 60 Geo. 3 & 1 Geo. 4, c. 4, entitled "An Act to prevent Delay in the Administration of Justice in Cases of Misdemeanor," which section provides,

among other things, that a party having *received notice* of an indictment found against him at a previous session, twenty days before the next subsequent session, shall "plead to such indictment thereat, and trial shall proceed thereon at the same session," unless a certiorari be obtained. The learned counsel contended, that the defendant was bound to take his trial at the present session. He admitted that he had not been in custody twenty days previous to the commencement of the session, but argued that he had received such notice as rendered it imperative on him to take his trial. Considerably more than twenty days before the session, notice of the bills having been found was given to Mr. Wickens, who was then the attorney of the defendant, and acted as such in an application for a certiorari which the defendant made. The certiorari was refused on the 12th of July, and the defendant soon afterwards made an affidavit, in which he stated that the indictments were found at the last session, and that he was informed that, by the next session, more than twenty days *209] would have elapsed, and that he should then be compelled to take his trial. The learned counsel submitted, that this was substantially receiving notice within the meaning of the statute.

H. Wilde, on the same side.—I would call the attention of your lordships to the object and intention of the act. It is not a penal, but a remedial statute. The object is to prevent delay. It cannot be denied, after the affidavit made by the defendant, that, from some source or other, he has had notice, and the notice need not be in any particular form, and need not come from the prosecutor himself.

Prendergast, for the defendant.—It is a statute to deprive the subject of a privilege, and must, to a certain extent, receive a strict construction. It is one of the six acts passed with that for the suspension of the Habeas Corpus Act. But the modern plan is to consider the plain meaning of the words, without reference to the intention of the legislature. The words *received notice* must mean more than merely *had notice*. The statute means not a general knowledge, but a particular formal notice to be given by the prosecutor, and similar and in allusion to the practice before, of the defendant giving notice to the prosecutor. It must be such a notice as to bind the prosecutor to appear and try upon it, and entitle the defendant to an acquittal if the prosecutor do not appear.

WILLIAMS, J., (*ROLFE, B.*, being present.)—It does not seem to me that there is any doubt upon the construction of the act of Parliament. The question is, whether, under the words of the statute, notice is to be considered as knowledge, or as a distinct formal notice, on the part of the prosecutor, to be given to the defendant. There does not appear to be any reference in the act of Parliament to any particular form of notice; but it seems to be intended to prevent the party from being taken by surprise. It seems to me, therefore, that the defendant must be prepared to take his trial at this session.

*210] *Bodkin* and *H. Wilde*, for the prosecution by the Duke of Brunswick.

Wilkins, for the prosecution by Mr. Vallance.

Prendergast and *Clarkson*, for the defendant.

BEFORE MR. JUSTICE WILLIAMS AND MR. BARON ROLFE.

REGINA v. CUDDY.

Where two persons go out to fight a deliberate duel, and death ensues, all persons who are present, encouraging and promoting that death, will be guilty of murder.* And the person who acted as the second of the deceased person in such a duel may be convicted of murder, on an indictment charging him with being present, aiding and abetting the person by whose act the death of his principal was occasioned.

THE indictment charged a person, named Munro, with the wilful murder of David Lynar Fawcett; and the prisoner, and two others, named Gulliver and Grant, were charged with being present, aiding and abetting Munro in the act.

The death of the deceased, Colonel Fawcett, was shown to have occurred on the 1st of July, in a duel, at Camden Town, in which Lieutenant Munro was one of the principals, and the prisoner was said to have acted as the second of the deceased.

The evidence as to the prisoner's identity was not very direct and positive.

WILLIAMS, J., (ROLFE, B., being present,) in summing up, said—The question is, whether the prisoner was at the spot at the time, and whether he took such a part as amounts, in the language of this indictment, to an aiding and abetting of the principal offender. I am bound to tell you, as a matter about which my learned brother and myself have no doubt, (nor, I believe, has any other judge any doubt about it,) that, where two persons go out to fight a deliberate duel, and death ensues, all persons who are present on the occasion, encouraging or promoting that *death, [211 will be guilty of abetting the principal offender. I give them no particular name, but say, that all persons who are present, aiding, assisting, and abetting that deliberate duel, are within the terms of such an indictment as this. With respect to the facts, there is very little doubt, if any, that Colonel Fawcett was killed in a duel on the day mentioned in the indictment; and if the parties went out coolly and deliberately to fight the duel, then the killing by Lieutenant Munro will amount to murder; and then the question will arise, whether the prisoner at the bar was present at that time, aiding, assisting, and abetting the combatants on that occasion. Lord Hale, though an exceedingly sound lawyer, considered that, as far as related to the second of the party killed, the rule of law had been too far strained; and seems to have doubted whether such second should be deemed a principal in the second degree. But, if this doubt were correct, it might be suggested, on the same principle, that Colonel Fawcett was guilty of suicide. Such a course is straining the principles of law till they become revolting to common sense. After stating the evidence, his lordship left the case to the jury, who found the prisoner Not guilty.

Sir F. Pollock, A. G., *Waddington*, and *Montagu Chambers*, for the prosecution.

Shee, Serjt., and *Ballantine*, for the prisoner.

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*REGINA v. HAMILTON.

The words "without any reasonable and probable cause," in the stat. 7 & 8 Geo. 4, c. 29, s. 8, concerning sending threatening letters, &c., apply to the money demanded, and not to the accusation threatened to be made.

THE prisoner was indicted for feloniously sending to one J. H. a certain letter, demanding money from her, with menaces, against the statute, &c. (a)

The letter sent by the prisoner to the prosecutrix was signed with the name of Bell, saying, amongst other things, that she must know that he had been at great expense in watching her movements, adding, "Will you pay me for the expense and trouble I have been at, and keep all a secret; or will you refuse to pay me and have all your friends know your mishaps?" After alluding, in threatening and mysterious language, to some facts injurious to her reputation, of which he stated himself to be in possession, he told her that if she did not write by twelve o'clock on a certain day, he would explain all to her father and brothers, and all her friends; he further wrote, "Besides, the Editor of the Satirist Newspaper would gladly purchase a secret so well authenticated as mine."

The prisoner, afterwards, sent a letter to the father of the young lady, in the name of Hamilton, which letter began thus:—"Sir,—I beg to inform you that I have received instructions from Mr. Robert Bell, of George street, to subpœna a daughter of yours, Miss J—— H——, as a witness against a brothel in this street, which Mr. Bell, and others, have authorized me to indict at the ensuing session, and which brothel your daughter has frequently visited during the last two months, in company with an
*213] *officer who will also have to appear as a witness for the prosecution."

The young lady was not produced as a witness at the trial, and it was proved that she was unable to attend from illness. On the part of the prisoner, it was suggested, that, as the fact of her having gone to the brothel mentioned in the letter was not negatived, it could not be concluded that the prisoner had not reasonable and probable cause for the accusation he threatened to make, so as to bring him within the provisions of the act of Parliament.

ROLFE, B., (WILLIAMS, J., being present,) on summing up, told the jury, that, in his opinion, the words "reasonable and probable cause," as used in the act of Parliament, clearly applied to the money demanded and not to the accusation constituting the threat; and that if the lady had, in fact, gone to the brothel, it would not have made any difference in the case.

Verdict—Guilty.

Clarkson and Bodkin, for the prosecution.

Ballantine, for the prisoner.

(a) 7 and 8 Geo. 4, c. 29, s. 8, which enacts that if any person shall knowingly send or deliver any letter or writing, demanding of any person, with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing, accusing, &c., such offender shall be guilty of felony.

SEPTEMBER SESSION, 1843.

BEFORE MR. JUSTICE CRESSWELL.

REGINA v. AMELIA TAYLOR.

A post-dated check is an order for the payment of money within the meaning of the statute 11 Geo. 4, & 1 Will. 4, c. 66, relating to the forging and uttering of orders "for the payment of money," &c.

THE prisoner was indicted for forging and also for uttering, on the 28th of August, a forged order for the payment of the sum of 2l. 10s., with intent to defraud Richard Francis Adams.

* The instrument was a banker's check, purporting to be drawn by W. Watkins, upon the house of Dimsdale & Co. It bore date the 29th of August, and was given to the prosecutor by the prisoner on the 28th of August. [*214

Ballantine, for the prisoner, objected that it was not an order for the payment of money, as it was post-dated.(a) He submitted, that, in order to convict the prisoner, it should purport to be an order for the *present* payment of money, and one which the party would be bound to obey on its presentation.

CRESSWELL, J., was of opinion that it was an order for the payment of money within the meaning of the statute, and that, to make it such, it was not necessary that the party should be bound to obey it at once, if genuine. It might be that there were no effects, and then the party would not be bound to pay a check at once, and yet it would be an order for the payment of money.(b)

Charnock, for the prosecution.

Ballantine, for the prisoner.

(a) By the provisions of the Stamp Act, 55 Geo. 3, c. 184, "Every person who shall make and issue, or cause to be made, &c., any bill, *draft*, or order, payable to bearer on demand, on any banker, or person acting as such, which shall be dated on any day subsequent to that on which issued," &c., unless duly stamped, as a bill of exchange, shall forfeit £100; and every person knowingly receiving such in payment, &c., shall forfeit £20, and any banker who shall pay such, knowing it to be post-dated, shall forfeit £100, and not be allowed the money so paid in account.

(b) A man may be indicted for forging an instrument, which, if genuine, could not be made available, by reason of some circumstances *not appearing on the face of the instrument*, but to be made out by extrinsic evidence. *R. v. McIntosh*, 2 Leach, 883; 2 East, P. C. 942.

*OCTOBER SESSION, 1843.

[*215

BEFORE MR. JUSTICE MAULE AND MR. JUSTICE WIGHTMAN.

REGINA v. PEDRO DE ZULUETA the Younger.

A merchant of London was indicted for an offence against the act of Parliament prohibiting slave-trading. His counsel applied to the court to allow the prisoner to sit by him, not on the ground of his position in society, but because he was a foreigner, and several of the documents in the case were in a foreign language, and it would,

therefore, be convenient for his counsel to have him by his side, that he might consult him during the trial:—*Held*, that the application was one which ought not to be granted.

The provisions of the stat. 5 Geo. 4, c. 113, are not confined to acts done by British subjects in furtherance of the slave trade in England or the British colonies, but apply to acts done by British subjects in furtherance of that trade in places not part of the British dominions.

In order to convict a party who is charged with having employed and loaded a vessel for the purpose of slave-trading, it is not necessary to show that the vessel which carried out the goods was intended to be used for bringing back slaves in return; but it will be sufficient if there was a slave adventure, and the vessel was in any way engaged in the advancement of that adventure.

Where a party living in London was charged with having chartered a vessel and loaded goods on board for the purpose of slave-trading, it was *Held*, that slave-trading papers found on board the vessel when she was seized in foreign parts, but not traced in any way to the knowledge of such party, were not admissible in evidence against him.

THE first count of the indictment stated in substance, that the prisoner and two other persons, one named Jennings and the other Bernardoes, (a) on the 1st of November, in the fourth year of her majesty's reign, to wit, at London, and within the jurisdiction of the Central Criminal Court, did illegally and feloniously *fit out, man, navigate, equip, despatch, use, and employ a certain ship or vessel*, to wit, a ship or vessel called the *Augusta*, in order to *accomplish a certain object*, which in and by a certain act of Parliament made and passed in the fifth year of the reign of his late majesty king George the Fourth, entitled "An act to amend and consolidate the Laws relating to the abolition of the Slave Trade," was and is *declared unlawful*, that is to say, "*to deal and trade in slaves*" contrary to the form of the statute, &c. (b)

*216] The second count was similar to the first, except that it stated the unlawful object to be "*to purchase slaves*."

The third count stated the object to be "*to deal and trade in persons intended to be dealt with as slaves*."

The fourth count expressed it thus: "*to purchase persons intended to be dealt with as slaves*."

The fifth count stated, that the prisoners did illegally and feloniously, and against the form of the statute in such case made and provided, *ship on board a certain ship or vessel called the Augusta, divers goods and effects*, to wit, 29 hogsheads of tobacco, 6 cases of arms, 1 case of looking-glasses, 10 casks of copper ware, 134 bales of merchandise, 1600 iron pots, and 2370 kegs of gunpowder, to be employed in accomplishing a certain object, &c., as in the first count.

The sixth, seventh, and eighth counts stated the means employed as in the fifth, and the unlawful object as in the second, third, and fourth counts.

The accused, who was a merchant carrying on a very extensive business, had been admitted to bail by consent of the prosecutor, and on his surrendering himself to take his trial.

Kelly, as the leading counsel for the defence, applied to the court that

(a) Neither of these persons was in custody.

(b) The statute referred to is the 5 Geo. 4, c. 113, and the section on which the indictment was framed is the 10th, by which persons dealing in slaves, or exporting or importing slaves, or shipping slaves in order to exportation or importation, or fitting out slave ships, or embarking capital in the slave trade, or guarantying slave adventures, or shipping goods, &c., to be employed in the slave trade, &c., are declared to be felons, and liable to be transported for any term not exceeding fourteen years, or confined and kept to hard labour for a term not exceeding five nor less than three years.

his client might sit near him during the trial, instead of going into the dock. He stated that he did not make the application on the ground of the station in life of the party accused, but in order that he, as his counsel, might communicate with him personally for the purposes of his defence, and especially as the accused was a foreigner, and many of the documents which would be given in evidence were in a foreign language. The case of *Mr. Horne Tooke*, 25 State Trials, p. 6, who was allowed to sit by his counsel, was referred to in support of the application. The case of *R. v. Douglas*, Car. & Mar., 193,(a) in which a *similar application was refused, was also alluded to for the purpose of distinguishing it from [*217 the present case, the application there being founded solely on the rank of the accused, as an officer in the British army.

MAULE, J., and WIGHTMAN, J., consulted together, and looked at the report of the trial of *Mr. Horne Tooke*, and after some consideration,

MAULE, J., said—The court has inspected the case in the State Trials of *Mr. Horne Tooke*, and it stands thus:—*Mr. Horne Tooke* claimed it as a right. He said, “My lord, I desire, as necessary for the purpose of my defence, that I may quit the situation in which I at present stand, and be placed near to those counsel which the court have assigned to me for my assistance in my defence.” Then Lord Chief Justice EYRE said, “That is an indulgence which I have hardly ever known (b) given to any person in your situation.” *Mr. Tooke* replied, “I am perfectly aware *that it is unusual, but I beg your lordships to observe [*218 that every thing in the course of these proceedings is likewise unusual. I beg your lordships to consider, that the proceedings upon the last trial will fill, as I am well informed by the short-hand writer, 1600 close printed octavo pages. That trial lasted nine days, eight days’ trial and one day between. The nature of the indictment is such, that it has been impossible for me to guess what would come before your lordships: it has been equally impossible for me to instruct my counsel; they cannot know the passages of my life; and from what I have seen of the last trial, the whole passages of my life, and those which are not passages of my life, but are only imputed to me, will be brought before you; how is it possible for my counsel to know those particular facts which are known only to myself? If ever there was a case where indulgence was fit to be granted, it is this; yet your lordships will forgive me for saying, that I claim it as my right by law, and do not ask it as an indulgence. Undoubtedly, I mean to show no disrespect to any one at this time, when it is my interest to conciliate; but I cannot help saying that, if I were a judge, that word indul-

(a) See also *Regina v. St. George*, 9 C. & P. 483.

(b) In the case of *Mr. Higgins*, the Warden of the Fleet, who was tried for murder at the Old Bailey, on the 21st of May, 1729, before *Mr. Justice Page* and *Mr. Baron Carter*, when the oath was being administered to the jury, the prisoner said, “My lord, the distance is too great to be heard; I desire I may come to the inner bar; for, my lord, when any inconvenience happens, it is the constant rule to admit the prisoner to come there; it was done in the case of *Sanders* and *Clifton*.” *Mr. Justice Page* replied, “Whenever the court conceives an inconvenience, it has been allowed; but I cannot allow it till then.” The prisoner was not, at that time, allowed to remove from the dock; but, subsequently, during the examination of one of the witnesses, the prisoner said, “My lord, I desire to come to the inner bar, for I cannot hear.” *Mr. Justice Page* said, “You shall have all reasonable indulgence, and if you cannot hear, you must be allowed to come.” And the permission was then granted, and the prisoner was removed to the inner bar. (See 17th St. Tri. pp. 311 and 315.) In the case of *Mr. Bambridge*, who was also tried for murder before the same judges, with the assistance of *Mr. Serjeant Raby*, Deputy Recorder of London, upon the prisoner saying that he could not hear the witness, and desiring him to raise his voice, the court permitted the prisoner to come to the inner bar. (Ib. p. 387.)

gence should never issue from my lips. My lord, you have no indulgence to show, you are bound to be just, and to be just is to do that which is ordered; what is not ordered I shall not ask, and your lordship cannot grant; but if you have any doubt that it is my right by law to be placed in that situation which is best adapted for me to make my defence, I shall desire to encounter the learning of the attorney and solicitor-general." After some further observations, Mr. Tooke continued:—"I came here from a very close custody of a whole summer, and a whole autumn. I have not, any more than your lordship, many summers or many autumns to spare; that custody has been attended with many degrading and many humiliating circumstances, and some inhuman circumstances, at my age *219] and with my infirmities. It has, in some measure, impaired the health and the strength of my body. I come to you but half a man. Your lordship will expect a whole defence, and I do not doubt but that I shall give you a whole defence, provided you furnish me with the necessary means of doing it." Lord Chief Justice EYRE then says, "Mr. Tooke, you have been furnished with that which the law considers as the necessary means to enable you to make your defence: you have had counsel assigned to you; they have had, or might have had, access to you at all reasonable hours; that is what the law allows you. You have taught the court not to use the word indulgence; and you have pointed out to them their duty that they are to give no indulgence. I am apprehensive that it would be considered as an extraordinary indulgence if the court were now to do that which you ask, because that is not done to other prisoners; it was not done to another prisoner who went immediately before you, who had the same stake that you have, nor is it done to all other prisoners who do come to this bar; and, therefore, the court are not permitted, without doing injustice to others, to grant that which you ask upon the ground on which you ask it. But you have mentioned another circumstance which is extremely material, and which will, in my mind, warrant the court to do that which you think they ought not to do—to indulge the prisoner. You have stated the condition of your health, and that in the place in which you stand your health will suffer; the court has no desire to put you under any difficulties; they wish that you should be enabled to make your defence in the best way imaginable; and if the situation in which you stand is really likely to be prejudicial to your health, and, therefore, likely to disable you from making your defence in the manner you might otherwise make it, I shall put it to my lords to consider whether you may not be indulged with that which you have now asked." After some further observations from *220] Mr. Tooke, the Lord Chief Justice consulted the other judges present, viz., Lord C. B. MACDONALD, Mr. Baron HOTHAM, Mr. Justice GROSE, and Mr. Justice LAWRENCE, and then said, "Mr. Horne Tooke, I have consulted my lords the judges who are present; they feel themselves extremely disposed to indulge you on the score of your health; they think that it is a distinction which may authorize them to do that in your case which is not done in other cases in common; they cannot lay down a rule for you which they would not lay down for any other man living; but if your case is distinguishable from the cases of others, that does permit them to give you the indulgence which you now ask." Mr. Tooke then said—"I am very much obliged to your lordships, and am very well content to accept it as an indulgence, or any other thing. Undoubtedly, it is very acceptable to me, and very necessary for my health. I am glad to save the time of the court." That case Mr. Kelly seems to show that, in

the opinion of those judges, yours is an application which ought not to be granted. It was denied to Mr. Tooke on the ground which you have now taken, and granted him only on the ground of his health. We must take care that we do not do that which might seem to be making a difference between one person and another charged with felony. The court, therefore, cannot grant the application.

Mr. Zulueta then went into the dock and pleaded not guilty, and the jury were charged. But, previous to the commencement of his opening address,

Bompas, Serjt., for the prosecution, applied to have Mr. Gurney, jun., the short-hand writer, who took notes of the prisoner's evidence before a committee of the House of Commons, examined at once, as his presence was required at the Special Commission in Wales. This was consented to on the part of the prisoner, and Mr. Gurney stated, that the whole of Mr. Zulueta's evidence was correctly reported in a printed book produced, entitled, "Report from the *Select Committee on the West Coast of Africa," &c. And, on the part of the prosecution, it was admitted, [*221 that the other parts of the evidence given before the same committee were correctly reported in the same book.

The facts of the case, so far as they are material, with reference to the points decided, were substantially these:—In the month of June, 1839, a vessel called "*The Golupchick*" was seized off the coast of Africa, as a vessel engaged in the slave trade, at which time Bernardos, one of the persons named in the indictment, was the captain. The court at Sierra Leone refused to interfere with her, as from her papers and colours she appeared to be a Russian vessel, and she was accordingly sent to England and given up to the Russian authorities. When Bernardos arrived at Portsmouth, he immediately sent a letter to the house of Zulueta & Co., but the contents did not appear, as the prisoner did not produce the letter. In June, 1840, the *Golupchick* was sold to a person named Emanuels, who afterwards agreed to sell it to Jennings, the other person named in the indictment, for £650. Jennings, who had been in the employ as a captain of Martinez & Co., of the Havannah, wrote to the house of Zulueta & Co., in London, who were the correspondents and agents of that house on the subject. On the 20th of August, the following letter, signed by the prisoner, Mr. Zulueta, jun., was sent to Jennings in reply:—

"London, 20th August, 1840.

"Sir—In reply to your favour of yesterday, we have to say that we cannot exceed £500 for the vessel in question, such as described in your letter, viz., that, excepting the sails, the other differences are trifling from the inventory; if you cannot, therefore, succeed at those limits, we must give up the purchase, and you will please act accordingly.

"We remain, &c.,

"ZULUETA & Co."

*Notwithstanding this, on the 29th August, 1840, Zulueta & Co. drew a check on their bankers for £650, which was cashed in large [*222 notes; and on the 31st of the same month the same notes were paid to Emanuels, at Portsmouth, for the vessel, by Jennings and Bernardos in company together.

The name of the vessel was changed from the *Golupchick* to the *Augusta*; and on the 26th of September, 1840, the house of Zulueta & Co. wrote the following letter:—

"Captain Thos. Jennings, Broad-street, Portsmouth.

"London, 26th Sept., 1840.

"Dean Sir,—We have received your letter of yesterday, whereby we observe that the sum we have remitted you will not be sufficient to cover all the expenses to clear the ship. We much regret you have omitted mentioning the sum you require, which prevents our remitting you the sum by this very post; thus causing a new delay in leaving that port, so contrary to our wishes.

"You will, therefore, write to us to-morrow, that we may receive your reply on Monday morning, informing us of the amount necessary to finish paying all your accounts and expenses, to remit you the sum by Monday night's post, in order that you may be able to sail for Liverpool on Tuesday or Wednesday at the furthest. You must not omit stating the amount required; and waiting your reply,

"We remain, very truly, dear sir,

"Your obedient servants."

This letter, as well as that of the 20th August, was found on board the *Augusta*, in the month of February, 1841, at which time she was seized at the Gallinas by Capt. Hill, who had previously seized her as the *Golup-chick*. Jennings was acting then as the captain.

The signature to the letter of the 26th September had been cut out; but the following postscript was in the handwriting of the prisoner's father and partner, Mr. Zulueta, *senior:—"According to our Liverpool house
*223] notice, you will go there to the Salt House Dock."

The charter-party was also found on board. It was dated Oct. 19th, 1840, and purported to be made between Mr. Thomas Jennings, master and owner of the good ship or vessel called the *Augusta*, and Messrs. Pedro, Martinez, & Co., of Havannah, merchants, and provided that a cargo of legal goods should be shipped from the factors of Martinez & Co.; and that the vessel, when loaded, should *proceed to Gallinas, on the coast of Africa*, and deliver her cargo there, after which she might be sent on any legal voyage, &c. It contained also the following passage: "The captain being indebted to the charterers in certain sums, as per acknowledgment elsewhere, the freights earned by the vessel to be held as general lien for such sums; and in any settlement for such freights, the said advances to be deducted from the vessel's earnings." It was signed by Jennings himself, and in the handwriting of the prisoner, "For Pedro, Martinez, & Co., of Havannah, Zulueta & Co."

The *Augusta* cleared out for Gallinas on the 9th of November, 1840, having in the mean time taken on board a large quantity of cottons, muskets, tobacco, gunpowder, &c., as her cargo.

The cabin boy was called as a witness for the prosecution, and inter alia said—"After we left Liverpool a heavy gale of wind arose, which lasted some time—it might be several days after we sailed; we were not a great distance from Cork or Falmouth; there was a fair wind back, if the skipper had a mind to run back; there was a great disturbance with the crew about going back; they said the vessel was not safe to go where the skipper wanted; she was to sail for the coast of Africa; they wanted her to go back; he said, if he did, he was afraid he should lose his crew; they said she was not safe to go to the coast of Africa; it was at last determined he should sail to Spain. I do not know whether the wind was fair for Spain; we were, I dare say, a fortnight or more before we got to Spain; we

*came to the port of Cadiz ; the best part of the men was discharged there ; I believe their leaving was through the captain's misconduct ; we remained at Cadiz a month, or it might be two months : the best part of her cargo was moved out at Cadiz in small vessels ; there was some tobacco which was damaged ; I do not know whether any part remained.' [*224]

To show the nature of the trade carried on at Gallinas, Capt. Hill and Denman, of the Royal Navy, and Lieutenant-colonel Nicholl were called as witnesses. The first of these gentlemen stated, that he had known the place for several years, and did not know of any trade or commerce what ever being carried on there, except the slave trade. The second said, that there was no trade carried on but the slave trade : he said also, " At most places on the coast there is both a lawful trade carried on and the slave trade : the Gallinas is an exception, the only exception I know indeed ; I know that from my own personal presence on the spot." The third said—" The general course is to barter British manufactured goods for slaves, who are brought from the interior of Africa to places where the trade is carried on : slaves are usually brought to the Gallinas for the purpose of being sold or bartered for the goods which they meet with there ; it is notoriously the most infamous slave-dealing port on the whole coast of Africa ; there is a continual drain of slaves from all parts of the interior contiguous to it, continually coming down to the Gallinas ; there is nothing going on there but the slave trade."

The cockets found on board the vessel were produced ; they were all made out in Jennings's name alone, as was also the bill of lading.

Several letters, nine in number, which were found on board the Augusta at the time she was seized, were tendered in evidence.

Kelly objected to their reception, on the ground that whatever was done by the prisoner was done in London and previous to November, 1840, and therefore that letters *found in the vessel on the coast of Africa, in February, 1841, were not admissible in evidence against him. [*225]

Bompas and Talfourd, Serjts., for the prosecution, contended that the letters were admissible, as two things were to be proved on the part of the prosecution ; first, the destination of the vessel ; second, the prisoner's connection with the transaction. How can we show the intention with which the vessel was sent, but by showing what the vessel did, and what was found in her ? Our case is, that Jennings, who was captain at the time of the seizure, was the agent of Zulueta, by a kind of juggle ; and that the charter-party and the shipment of the goods were not *bonâ fide*, but a mere blind.

THE JUDGES decided, that, as the letters were merely found on board the vessel, and were not traced in any way to the knowledge of the prisoner, they were not admissible in evidence against him.

The same decision was given as to an anonymous letter, in the handwriting of Bernardos, addressed to Jennings whilst in England, before the vessel sailed, which letter was also found on search on board the vessel, but was not traced in any way to Mr. Zulueta. Capt. Hill said, that when he seized the vessel, it was not fitted up as a slave vessel, but added that the slave fittings could be obtained at Gallinas, and that three or four hours would be sufficient to put them in.

Various parts of the evidence given by the prisoner before the committee of the House of Commons were read. In it he admitted that he had managed the whole of the business relating to the Augusta, but denied that he had any knowledge that the vessel or goods were to be used for

the slave trade. His explanation of the transaction, in substance, was, that the firm of Zulueta & Co., as agents for Martinez & Co., purchased the *Augusta* for Captain Jennings, with money belonging to Martinez & Co., *226] in their hands, (Jennings *transferring the vessel as security for the amount,) and caused her to be despatched with the cargo, which was consigned to correspondents of Martinez & Co., by their order at Gallinas, that Zulueta & Co. had no interest in the result of the adventure, and had nothing further to do with the transaction. He admitted that their house had had transactions with the coast of Africa to the amount, in twenty years, of about £400,000; about £20,000 or £22,000 of which might be connected with the Gallinas. In answer to the question, "How do you account for this vessel carrying letters upon slave business?" he said, "I account for it in this way: first of all, it is impossible for us to answer here what letters will be put on board a vessel at Cadiz; but there is very seldom any communication between Cadiz and the Gallinas; whatever letters there were must have gone by such random occasions as arose. As to the fact that whoever wrote those letters is engaged in the slave trade, the letters will speak for themselves."

The case for the prosecution being closed,

Kelly, for the prisoner, submitted that there was not any evidence to go to the jury of the prisoner's participation in any slave-dealing object. There was no doubt that he was a party to the purchase of the vessel; but the charge against him was, that he employed the vessel and shipped the goods for the purpose of trading and dealing in slaves.

MAULE, J., was of opinion that the case must go to the jury.

Kelly then submitted that the case was not within the statute 5 Geo. 4, c. 113, on which the indictment was framed: and contended that the act did not apply to a trading in slaves in foreign parts, but only to slave-trading in England or English colonies.

*227] MAULE, J., and WIGHTMAN, J., were both of opinion that *the case was within the statute, and gave judgment accordingly. MAULE, J., *inter alia*, saying—"I cannot help thinking that the legislature had the intention, among other things, of preventing Englishmen from dealing in slaves on the coast of Africa."

Kelly requested their lordships to reserve the point, but

MAULE, J., said that they did not entertain any doubt upon the subject, and, therefore, should decline to do so.

Kelly then addressed the jury on the facts of the case, and called a great number of highly respectable witnesses, merchants, and others, who gave the prisoner the highest character for integrity, humanity, and honour.

MAULE, J., (WIGHTMAN, J., being present,) in summing up *inter alia*, told the jury that the charge did not necessarily import, nor was it necessary to prove, that the ship itself, the *Augusta*, was intended to import slaves from the Gallinas. If there was a slave adventure, which it was intended should be accomplished and carried into effect there, that would be an object prohibited by the act of Parliament. If the goods were shipped to be employed for the purpose, it would be sufficient to sustain the indictment. His lordship left it to the jury to say whether there was in fact a slave adventure, and, if there was, whether the prisoner, who managed the transaction, was or was not aware of the purpose for which the vessel was intended to be used.

Verdict—Not guilty.

Bompas and *Talfourd*, Serjts., and *Payne*, for the prosecution

Kelly, *Clarkson*, and *Bodkin*, for the prisoner.

*NOVEMBER SESSION, 1843.

[*228

BEFORE MR. BARON PARKE, AND MR. JUSTICE COLTMAN.

REGINA v. BARNARD GREGORY.

The court will direct an affidavit in a case of misdemeanor which contains matter both scandalous and irrelevant, to be removed from the files of the court, and the party who filed it is liable to be visited as for a contempt of court. Also, if an affidavit contain matter that is relevant and scandalous, the court, though they cannot direct its removal from the files, will give the party attacked an opportunity of denying the defamatory matter upon oath, by a counter affidavit.

Where a party had pleaded guilty at the Central Criminal Court to an indictment for libel, and affidavits were filed both in mitigation and aggravation, the judges refused to hear the speeches of counsel on either side, but formed their judgment of the case by reading the affidavits.

THE defendant had pleaded guilty to two indictments for libel, and *Bodkin*, who was for the prosecution in one of the cases, moved for the judgment of the court upon him.

THE COURT said they had not read the affidavits which had been filed, and were not prepared to pass judgment on the defendant then.

Montagu Chambers then complained to the court, on behalf of certain persons who were deponents in certain affidavits filed in mitigation of punishment, of the manner in which those persons had been treated by certain affidavits filed in aggravation of punishment on the part of Mr. Vallance, the prosecutor in one of the cases. The learned counsel said, that, on the authority of some decisions, he made his application to the court on behalf of the parties whom he represented, and who had been made the subjects of general attacks, slanderous and irrelevant, and injurious to the course of justice, as tending to intimidate persons, and prevent them from coming forward to make statements on oath.

PARKE, B.—You said you did this on the authority of certain decided cases, will you mention them?

Montagu Chambers.—The principal case is in Burrow's Reports, and there are others, decided in the Court of *Chancery. My clients [*229 could not indict the parties for perjury, and, therefore, the present application is their only remedy. That application is, that the objectionable matter may be struck out of the affidavits. The case in Burrow is *Astley v. Younge*, 2 Burr. 807.(a)

PARKE, B.—Will you state some of the passages in the affidavits to which you allude?

Montagu Chambers.—One passage is, that the deponents believe that the said several persons, naming them, "are all unworthy of credit, and are all persons of bad repute, and that they are actuated by bribes, &c., and are in the habit of frequenting gambling-houses of the most infamous description," &c. In the case of *Astley v. Younge*, Lord MANSFIELD says, 2 Burr. 809, "Show that a matter given in evidence in a court of

(a) Action on the case for a libel, contained in an affidavit. Plea, that the defendant made the affidavit in his own defence, in answer to a complaint made against him in the Court of King's Bench. Demurrer to the plea. Judgment for the defendant on the demurrer.

justice may be prosecuted in a civil action as a libel. *The court, indeed, before which such evidence is given, may censure it.*" And again, his lordship says, 2 Burr. 810, "There can be no scandal if the allegation is material; and if it is not, the court, before whom the indignity is committed by immaterial scandal, may order satisfaction, and expunge it out of the record, if it be upon record." There is another case in which Lord ELDON laid down the principle on which, in such a case, the court ought to proceed. I allude to *Ex parte Simpson*, 15 Ves. jun. 476.(a) That *230] was the first application of the kind in bankruptcy, and *Lord ELDON had, therefore, to deal with it on principle. His lordship says, "This is the first application of the kind in bankruptcy. With regard to its object there are some general principles which cannot be doubted. If that which is stated is material to the issue, it may be false, but cannot be scandalous; if relevant, it is not impertinent; though scandalous in its nature, if relevant and pertinent, it cannot be treated as scandalous; and, if false, it must be dealt with in another way: but if irrelevant, and especially if also scandalous, there would be much reason to regret, that a court should not be armed with the power to protect parties from the expense, and its records from the stain, which too frequently arise from the introduction of irrelevant and scandalous matter upon affidavits in this jurisdiction." His lordship goes on to say, "Upon the question, whether I have the power to grant the relief in bankruptcy, I have no doubt whatsoever; and I do not think, with reference to this subject of scandal, in proceedings either in causes or in bankruptcy, that any application by any person is necessary. The court ought to take care, that either in a suit or in this proceeding, allegations bearing cruelly upon the moral character of individuals, and not relevant to the subject, shall not be put upon the record." His lordship eventually made an order, directing the solicitor who had made the affidavit complained of, within fourteen days to pay the costs of the application, and all the costs out of pocket, to be taxed as between solicitor and client; and that after payment of those costs, the affidavit should be taken off the file.(b)

Montagu Chambers was proceeding with his argument, when *231] *PARKE, B., said, "Will it suit the object of your motion, and the feeling of the other side, that we should strike out from the affidavits on both sides what is scandalous and irrelevant?"

COLTMAN, J.—Lord ELDON says, that it is the duty of the court to see that that is done.

(a) In that case the petition stated that a petition had been presented, praying that a commission of bankruptcy might be superseded as fraudulent and concerted, &c.; and added, that, in support of such petition, an affidavit was filed by the solicitor concerned in it, containing matter and charges of a criminal nature reflecting on the petitioners, and very prejudicial to their character and reputation, not only false and unfounded, but irrelevant and scandalous, as well as impertinent. The petition prayed that the said affidavit might be taken off the file, or that the scandalous and impertinent charges and matters contained therein might be expunged, and that the said solicitor might be ordered to pay the costs. The passage chiefly objected to as scandalous, asserted, that a party who supported the commission was one of a gang of swindlers who attended at Lloyd's Coffee-house, &c.

(b) About seven years after the above decision, the Lord Chancellor ordered an affidavit in bankruptcy to be taken off the file, for scandal and impertinence, with costs, which his lordship said are always given upon this ground, as between attorney and client; adding that he had found a precedent for that as long ago as Lord Hardwicke's time, though it had been doubted in his own time. *Ex parte Stewart*, 15 Ves. jun 478. (n.)

PARKE, B.—We will take care to expunge what is both scandalous and irrelevant. If it is relevant, it cannot be expunged. But the court might think that some parts were such that the persons accused should have some opportunity of answering them, though, as not being irrelevant, they could not be expunged; and if on reading these affidavits we should see any such matter in them, we will take care that the parties shall have an opportunity of answering them.

Montagu Chambers then handed up to the court the names of his clients, and moved, that the party who should be found to have made the objectionable statements, should be directed to pay the costs of his application.

Wilkins, for Mr. Vallance, one of the prosecutors, designated the application as a plan concocted with the defendant in order to delay his punishment.

PARKE, B., inquired of *Wilkins* if he consented to the proposed arrangement. *Wilkins* replied that he did, but complained that *Chambers* in his application had furnished further attacks upon Mr. Vallance.

PARKE, B.—This will now come to an end, as we intend *that the defendant shall be brought up for judgment on Saturday [*232 morning.

Accordingly on that day, COLTMAN, J., in giving the judgment of the court, said,—An application was made several days ago on the part of certain persons mentioned in the affidavits of two other persons, complaining of irrelevant statements injurious to their character and interests. My brother PARKE and myself have looked through those affidavits, and we find that there is one which contains matter that is scandalous and not relevant. The party filing such an affidavit is liable to be visited as for a contempt of the court: but as there was undoubtedly matter of aggravation in the affidavits on the other side, we do not think it necessary to do more than to direct that this affidavit be removed from the files of the court.

Sentence of imprisonment in Newgate, on each of the indictments, was afterwards passed on the defendant.

Wilkins, for the prosecution.

Montagu Chambers, for the applicants.

The judges at the previous session, as well as those by whom the sentence was passed, refused to hear the speeches of counsel, either in aggravation or mitigation of punishment; saying, that the officer of the court informed them, that it had never been the practice to hear counsel under such circumstances.

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*DECEMBER SESSION, 1843.

BEFORE LORD DENMAN, C. J., AND MR. BARON PARKE.

REGINA v. ROSENBERG.

An adulterer cannot be convicted of stealing the goods of the husband brought by the wife alone to his lodgings, and placed by her in the room in which the adultery is afterwards committed, merely upon evidence of their being found there; but it seems it would be otherwise if the goods could be traced in any way to his personal possession.

THE prisoner was indicted for stealing goods, value 62*l.* 5*s.*, the property of Alexander Victor Philippe Bohain.

Bodkin, for the prosecution.—The circumstances of this case will leave no doubt that the prisoner induced the wife of the prosecutor to come to his lodgings; and she came in a coach, and brought with her the property mentioned in the indictment, and it was put into the prisoner's lodgings, and the prisoner and the prosecutor's wife slept together there as man and wife. The property did not consist of female apparel, or of articles exclusively for female use. When the prosecutor was before the magistrate, the case of *R. v. Tolfree*, M. C. C. 243, was cited, and the magistrate, on the authority of that case, committed the prisoner for trial; but he was afterwards admitted to bail by one of the learned judges. That case proceeded on the principle that adultery destroys the presumed consent of the husband; and, in a more modern case, before Mr. Justice COLERIDGE, it was held, that the removal of goods in contemplation of adultery is the same thing. This was the case of *R. v. Tollett & Taylor*, Car. & Mar. 112. But the present case differs from both those cases. But I should submit that, on principle, the possession of the wife was the possession of the husband; and that, even when she had carried the goods to the prisoner's lodgings, they continued in the husband's possession, and the prisoner receiving them there was guilty of larceny. I cannot, however, trace the *234] goods in this case *to the individual possession of the prisoner by any particular act of his, but can only show that they were found at his lodgings, some of them in the room in which he and the prosecutor's wife slept together.

PARKE, B.—There is no evidence in this case as there was in *R. v. Tolfree*, that the parties were together at the time when the goods were removed. That was the ground of the decision in that case.

Bodkin.—There is a passage in Dalton as to the delivery of the husband's goods by the wife to the adulterer, constituting felony in him.(a)

PARKE, B.—If that question arose, I should reserve it for the opinion of the judges. Then comes the difficulty in your case, that you cannot show any distinct possession on the part of the prisoner.

Bodkin.—Certainly I cannot produce such proof.

PARKE, B.—We are both, I believe, of opinion, that there is not enough

(a) Dalton's Justice, Ch. 157, parag. 17, p. 504, ed. 1727. The words of that passage are these: "If a married woman shall deliver to her adulterer her husband's goods, this is felony in the adulterer. *Lecture, Mr. Cook.*"

to convict the prisoner in this case. If there had been any separate act of possession by him, I should have reserved the point.

Lord DENMAN, C. J., assented.

Verdict—Not Guilty.

Bodkin and *O'Brien*, for the prosecution.

Clarkson and *Wilkins*, for the prisoner.

*CARDIFF SPECIAL COMMISSION, 1843.

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BEFORE BARON GURNEY AND MR. JUSTICE CRESSWELL.

REGINA v. JOHN HUGHES.

A challenge of the array, stating that the sheriff "has not chosen the panel indifferently and impartially, as he ought to have done, and that the panel is not an indifferent panel," is bad on demurrer as being too general.

INDICTMENT, on the stat. 7 & 8 Geo. 4, c. 30, s. 8, for feloniously having begun to demolish the house of William Lewis.

As soon as the prisoner had pleaded Not Guilty,

M. D. Hill, for the prisoner, challenged the array; and cited the case of *Rex v. Dolby*, post, p. 238.

The challenge was in the following form:—"And thereupon the said John Hughes doth challenge the array of the panel aforesaid, because he saith that the said panel was arrayed by John Homfray, Esquire, sheriff of the county of Glamorgan; and that the said sheriff has not chosen the panel indifferently and impartially, as he ought to have done, according to the law of this realm; and that the said panel is not an indifferent panel of the said county. And this he is ready to verify; wherefore he prayeth judgment that the said panel may be quashed."

GURNEY, B.—In the case of *Rex v. Dolby*, was not the ground of challenge stated in the challenge itself to be that the sheriff was a member of a society by whom the prosecution was instituted.

M. D. Hill.—I do not remember the precise form of the challenge in that case.

Pollock, A.-G.—I shall demur to this challenge.

**M. D. Hill*.—We join in demurrer.

Pollock, A.-G.—I submit that this challenge is bad, as the ground [*236 of challenge ought to be fully stated. There is no authority for this general form of challenge; there ought to be due notice to us as to the grounds of the challenge, as we might have to meet it by evidence.

Follett, S.-G., on the same side.—In this challenge of the array, no ground is stated for supposing that this panel has been chosen partially.

CRESSWELL, J.—It is consistent with this form of challenge that the sheriff has chosen the jury at the request of the prisoner himself.

Follett, S.-G.—I can find no instance of a challenge like this. In all cases the specific ground has hitherto been stated. (a)

M. D. Hill, for the prisoner. This being a demurrer, all the facts stated in the challenge are admitted. It is said that the ground of challenge is not sufficiently stated, but I apprehend that it is; because it is stated in the

(a) In *Trials per pais*, vol. 1, p. 206, et seq., several forms of challenge of the array will be found, some for the array being made "at the denomination and instance of the said plaintiff," others, because the sheriff was the cousin of one of the parties; and, in these latter, it is not only stated that the sheriff was the cousin of one of the parties, but how he was so, by naming all the intermediate members of the family.

challenge, and admitted by the demurrer, that this panel has been concocted without that regard to perfect impartiality that the law requires.

Montagu Chambers, on the same side.—It cannot be denied that, from *237] the earliest period, it has been a good *cause of challenge that the jury in general has not been arrayed indifferently and impartially; and in adopting a general mode of expression, many acts may be included; and we should be entitled to go into evidence on this challenge, to show that the general allegation is satisfied. This is analogous to the case of soliciting or inciting a person to commit a crime, or being a common barrator, or a common scold; in which cases the particular acts are never stated on the record, and for this reason, that if they were, the record might be extended almost infinitely; and with respect to inconvenience, I believe that there is no instance in which the ground of surprising the crown has been admitted as an argument.

GURNEY, B.—I think that this demurrer ought to be allowed. I think it impossible to traverse the general allegations of this challenge.

CRESSWELL, J.—I am entirely of the same opinion. The challenge alleges that the panel has been chosen partially, and not indifferently. It does not allege in what respect it has been so chosen; and I do not see how you can traverse such an allegation as that.

The demurrer was allowed, and the prisoner tried and found Guilty.

F. Pollock, A.-G., *Follett*, S.-G., *Chilton*, *John Evans*, and *E. V. Williams*, for the crown.

M. D. Hill, and *Montagu Chambers*, for the prisoners.

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*COURT OF KING'S BENCH.

Adjourned Sitings after Michaelmas Term, 1821.

BEFORE LORD CHIEF JUSTICE ABBOTT.

REX v. DOLBY.

On the trial at Nisi Prius of an indictment for libel on which only three special jurors appeared, the counsel for the prosecution prayed a tales, and the defendant challenged the array of the tales on the ground that the sheriff was a subscriber to a society who were the prosecutors, and on issue taken on this challenge, two triers were appointed by the court, who found in favour of the challenge, and the cause was made a remanet.

Whether the sheriff, whose array is challenged, is a competent witness to prove his indifference. Quære.

INDICTMENT for a libel.—Plea.—Not guilty.

This was a special jury case, and, on the case being called on for trial, only three special jurors appeared.

Gurney, for the prosecution, prayed a tales.

Scarlett, for the defendant, challenged the array of the tales, on the ground that *John Garratt*, Esq., one of the sheriffs, was a subscriber to the Constitutional Association, a society by whom this prosecution was instituted, and he cited the case of *Rex v. Shepard*, 1 Leach, C. C. 119.(a)

The challenge was in the following form:—

"And hereupon the said *Thomas Dolby* prays judgment of the panel of the tales

(a) In that case the prisoner had been convicted of a larceny in stealing two pounds and a half of soap, the property of *William Plomer* and two others, and it was moved in arrest of judgment, that *Mr. Plomer*, one of the prosecutors, was sheriff; but the case being reserved for the opinion of the twelve judges, it was held that the objection came too late in arrest of judgment, and that it should have been taken by the prisoner by way of challenge to the jurors.

aforesaid, because he says, that he is prosecuted by certain persons, styling themselves the Constitutional Association; and that the said panel of the tales has been made by William Venables and John Garratt, Esquires, sheriff of the county of Middlesex, and he says, that the said John Garratt, Esquire, at the time of the making of the said panel, was one of the subscribers to the said Association, and one of the prosecutors of this indictment; and this he the said Thomas Dolby is ready to verify, therefore he prays judgment that the said panel may be quashed."

Gurney.—I take issue on that challenge.

Abbott, C. J.—The court appoints triers. That course was adopted at Maidstone, some years ago. There, two of the gentlemen of the special jury were appointed triers.

The court appointed William Fisher, Esq., and James Tamplin, Esq., "to be triers, and they were sworn to "well and truly try whether at the time of [*239 the making of the panel in question, John Garratt, Esq., was one of the subscribers to the Constitutional Association, and one of the prosecutors of this indictment."

Scarlett, for the defendant, opened his case on the affirmative of the challenge.

It was proved by Mr. Nettlefold, the attorney for the defendant, that when he attended at the Crown Office, in May, 1821, to reduce the special jury in this case, he asked Mr Murray, the solicitor for the prosecution, for a list of the names of the Association, having been told by him, that they were the prosecutors of this indictment, and that Mr. Murray, on the 29th of May, sent him the list, (which he produced,) in which was the name of John Garratt, Esq., Alderman, as a subscriber of 5*l.* 5*s.* Mr. Nettlefold also stated, that the present indictment was preferred on the 29th of May, 1821.

Gurney, for the prosecution, addressed the triers, and proposed to show that Mr. Sheriff Garratt had ceased to be a member of the Association.

To prove this, Mr. Sheriff Garratt was called.

Scarlett.—I apprehend that he is not a competent witness; he is an interested person, and a party to the issue.

Abbott, C. J.—As no authority is cited on either side, I think the safer course will be to consider the witness to be incompetent, though I do not by any means say that he is so, and I wish that this may not be considered as a precedent, to be acted upon hereafter.

Mr. Joseph Budworth Sharpe, the assistant secretary to the society, and a subscriber to it, was called.

Scarlett objected to his evidence being received.

Abbott, C. J.—I do not think I ought to reject the evidence of Mr. Sharpe.

It was proved by Mr. J. B. Sharpe, that Mr. Sheriff Garratt had subscribed 5*l.* 5*s.* to the Association, which had never been returned to him; but Mr. Sharpe only knew of his having ceased to be a member of the Association, by a letter which he had seen.

Scarlett, in reply.—It appears clearly that the sheriff was a member of the Association, and for any thing that appears to the contrary, he may be so now.

Abbott, C. J. (to the triers).—This is a mere question of fact. It is proved that Mr. Sheriff Garratt was a member of this Association, and it is the duty of those who wish to show that he is not so now, to do so by clear and satisfactory evidence.

The triers found in favour of the challenge.

* *Abbott, C. J.*—The course now is, to put all these proceedings on the postea, and the case must stand over. [*240

The case was made a remanet.

Gurney and *Tindal*, for the prosecution.

Scarlett and *Joshua Evans*, for the defendant.

OXFORD WINTER CIRCUIT, 1843.

GLOUCESTER ASSIZES.

BEFORE BARON ROLFE.

REGINA v. PAUL RICHMOND.

An indictment which charged that the prisoner, on, &c., at, &c., feloniously had in his possession a mould, "upon which said mould was made and impressed the figure and apparent resemblance" of the obverse side of a sixpence, was held bad on demurrer, as not sufficiently showing that the impression was on the mould *at the time* when the prisoner had it in his possession, but a fresh indictment with the words "then and there" before the words "made and impressed" was held good.

Where a coining mould is made and impressed to resemble the obverse of a coin which is partly defaced by wear, the indictment should be in the form above mentioned, as the words of s. 10 of the stat. 2 Will. 4, c. 34, as to moulds to resemble *part* of the obverse of a coin, relate to cases where several moulds put together would make the obverse of the coin.

A judgment for a prisoner on demurrer in a case of felony, on the ground that the indictment does not sufficiently charge the felony, is no bar to a subsequent good indictment for the same felony.

INDICTMENT on the stat. 2 Will. 4, c. 34, s. 10. The first count of the indictment charged that the prisoner on the 24th day of August, 1843, at, &c., "one mould in and upon which said mould was *made and impressed the figure and apparent resemblance of one of the sides, that is to say, the obverse side of the queen's current silver coin, called a sixpence, knowingly and without lawful excuse, feloniously had in the custody of him the said Paul Richmond against the form of the statute," &c. The second count was precisely similar, only substituting the word "reverse" for the word "obverse."

Greaves, for the prisoner, demurred to the indictment, and contended *241] that it was bad, as it did not show that the *impression was on the mould at the time when it was in the possession of the prisoner. He cited the case of *Rex v. Horwell*, 1 Moo. C. C. R. 405, and 6 C. & P. 148.(a)

Daniel, for the Crown.—The allegation necessarily imports that the impression was on the mould whilst it was in the possession of the prisoner.

ROLFE, B.—I think that the objection is fatal, and that judgment must be given for the prisoner. Judgment for the prisoner.

—

The grand jury having found another bill against the prisoner, which

(a) In that case it was held that the indictment must expressly state that the prisoner uttered the acceptance. There the indictment alleged, that the prisoner, having in his possession a certain bill of exchange (which was set out,) with a certain forged acceptance on the said bill, which was also set out, afterwards did utter, &c., (then and there knowing the said acceptance to be forged,) the said bill of exchange, with intent, &c. It was objected that the count was bad, for not averring that the prisoner uttered the forged acceptance; and, upon a case reserved, the judges, upon full and mature consideration, held that the count was bad, as it was possible the acceptance might have been taken off the bill before the prisoner uttered it.

was verbatim the same as above mentioned, except that in each count the words "then and there" were inserted at the *.

Greaves, for the prisoner, proposed to put in a plea in bar, stating the former indictment and the judgment in the prisoner's favour, and suggested that he had heard a very learned judge intimate that he thought a judgment on demurrer in favour of a prisoner in a case of felony final.

ROLFE, B.—The ground of the judgment on the demurrer *being [242 in favour of the prisoner was, that the former indictment did not charge *any* felony. The prisoner was only discharged of the premises in that indictment specified, and that is no discharge from this indictment which *does* charge a felony.

The prisoner pleaded not guilty.

Greaves, for the prisoner, endeavoured to show, by the cross-examination of Mr. Powell, that the mould had never had a complete impression on it, but one similar to a sixpence much worn.

ROLFE, B.—Is that material?

Greaves.—Where the impression is imperfect, the indictment should state that the mould was impressed with the resemblance of part of one of the sides of the coin.

ROLFE, B.—The words of the 10th section of the statute as to moulds to impress a resemblance of part of one side of a coin apply to cases where several moulds are used to make one side of a coin, not to cases where the mould contains the whole side of a coin which has been partly worn away by use.

Verdict—Not guilty.

Daniel and *Keating*, for the prosecution.

Greaves, for the prisoner.

*REGINA v. JONES and BICK.

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An inquisition for manslaughter, charged that A. & B. in and upon C. did make an assault, and that A., with a certain stick or staff which he had and held, and B., with a certain stick or cane which he had and held, the said A., feloniously, &c., then and there did strike and beat in and upon the head of him the said A., "thereby then and there giving him" divers mortal wounds, &c.:—*Held*, bad as not sufficiently showing to whom the word "giving" referred; and *semble*, that the charging the blows to be given in the alternative with a stick or staff is also bad.

MANSLAUGHTER.—The grand jury had ignored the bill, and the prisoners were tried on the coroner's inquisition, which charged that, on the 4th of October, 1843, at Tetbury, the prisoners, in and upon Llewellyn Alley, in the peace, &c., "feloniously, wilfully, and unlawfully, did make an assault, and that the said William Jones, with a certain *stick or staff*, which he, the said William Jones, in his right hand then and there had and held, and the said James Bick, with a certain *stick or cane*, which he, the said James Bick, in his right hand then and there had and held, him, the said L. A., did then and there feloniously, wilfully, and unlawfully strike and beat in and upon the head of him, the said L. A., thereby then and there giving unto him, the said L. A., in and upon his head divers mortal wounds, bruises, and contusions, of which he died.

Greaves objected that this inquisition ought to be quashed. First, it stated that the instrument was a stick or staff; now no rule was better settled than that every averment in an inquisition must be direct and positive, and not in the alternative. He cited *Rex v. Cooke*, 7 C. and P. 559.

Secondly, it charged the beating, by each prisoner, with different instruments *separately*, and did not allege that the act of one was the act of the other prisoner; and there were but two modes in which several prisoners could properly be charged as principals, which were, either by charging all jointly with doing all the acts—the acts of each in a common purpose being the acts of all, in point of law—or by charging one with doing all the acts, and then averring that the others were present, aiding and assisting. Thirdly, it was perfectly uncertain to what the word “giving” referred, whether to Jones or Bick, or both.

*244] *Keating*, for the prosecution.—First, the words stick or “staff” mean the same thing. Secondly, no authority has been cited to show that the charge must be joint; if the same indictment charged two persons with stealing different articles at the same time and place, it would be good. Thirdly, “giving” plainly refers both to the prisoner Bick and to the prisoner Jones.

Greaves.—All the objections are unanswered, and the second is clearly good; indeed the instance of larceny, put on the other side, clearly shows it to be so. Suppose a count charged A with stealing a horse, and B. with stealing a cow, it would clearly be bad; and this is, if possible, a stronger case; for after charging blows inflicted by each with *different* weapons, it charges the death to have arisen from all the blows, leaving it quite in doubt to what the death is to be ascribed, and not showing that the blows of the one were, either in point of law or fact, the blows of the other. The case of *Reg. v. Devett*, 8 C. and P. 639, is precisely in point in principle, for though there the striking by each of the prisoners was stated on a different day, yet the ground of the decision was, that the inquisition did not show that the prisoners both joined in the striking; and so here the inquisition would be proved, although it turned out that Jones struck a blow, and went away, and that Bick afterwards, in his absence, struck another blow.

ROLFE, B.—I will consider of these points.

ROLFE, B., (on the next day,) said—I think this inquisition is clearly bad upon the last point taken; although, when I heard the objection taken, I did not think it fatal, yet having had an opportunity since of reading the inquisition, I am now satisfied that it must prevail. I am also disposed to think that there is great weight in the first objection.

Inquisition quashed.(a)

*245] *Keating* and *Cooke*, for the prosecution.
Greaves and *Carter*, for the prisoners.

(a) In *Heyden's case*, 4 Rep. 42, in which it was averred in the inquisition that A., B., and C., feloniously, wilfully, and of their malice aforethought, made an assault upon S., and then and there feloniously struck the said S., and then and there gave the said S. a mortal wound, it was held sufficient; and in the same case it was held that, if the mortal wound is given on one day, and the death be on another, and the inquisition charge an aider and abettor with being present, aiding, &c., on the first day, it is bad; but it was resolved that, to conclude that the aider committed the murder on the last day was sufficient, but the better form is to conclude that he committed the murder “in manner and form aforesaid.”

REGINA v. PETERS.

If a person drop any chattel, and another find it and take it away with the intention of appropriating it to his own use, and only restore it because a reward is offered, he is guilty of larceny.

The only cases in which a party finding a chattel of another can be justified in appropriating it to his own use is, where the owner cannot be found, or where it may be fairly said that the owner has abandoned it.

If a person find the chattel of another, and do not immediately bring it to the owner in the hope that by bringing it on the next day he may receive a present for so doing; whether this is a larceny—*quære*!

LARCENY.—The prisoner was indicted for stealing a golden chain, one breast-pin, and one eye-glass and pin, the property of Henry Bulkeley.

It appeared that Mrs. Bulkeley went into her garden, adjoining to the house, to walk, and, on her return into the house, missed the articles in question, which had been upon her dress when she went out walking. The prisoner was employed about the premises on the day in question, and, by the direction of the prosecutor, had walked through the garden in company with the gardener, immediately after Mrs. Bulkeley had returned into the house; and another gold ornament, missed at the same time with those included in the indictment, was found, upon search being made by Mr. Bulkeley, at a spot in the garden, by which the prisoner had passed. The prisoner made no mention to the gardener of having found any thing, and as soon as he had finished the work Mr. Bulkeley had directed him to do, which occupied about a quarter of an hour, he went away from the house. Mr. Bulkeley caused the loss to be cried the same [*246 evening, and the following morning, and offered £2 reward to any person who had found the articles. On the following morning, the prisoner went to the crier and stated, that he knew a person who had found the things, and took the crier to his house, fetched them down stairs and gave them to the crier, with directions to go to Mr. Bulkeley's with them, but not to deliver them up unless the reward of £2 was paid. His wife, in his presence, said that she found them in a street in Cheltenham, a quarter of a mile from the prosecutor's; and the prisoner, on two subsequent occasions, stated that he found them in two other places, neither being the garden. The crier went to the prosecutor's, and refused to deliver up the things, and afterwards the prisoner himself went and refused to deliver them unless the reward was paid, which Mr. Bulkeley refused, as he thought the prisoner ought to have brought them to the house, and had been guilty of stealing in taking them away. Mr. Bulkeley had made inquiries after the prisoner at his master's, but had not found him on the day of the loss.

Greaves, in his opening, cited the cases of *Merry v. Green*, 7 M. & W. 623, (a) and *Regina v. Kerr*, 8 C. & P. 176, and submitted that it was the duty of the prisoner immediately to have taken the articles to the house, and made inquiries as to the owners. That although no case had, perhaps, gone the length of deciding the point, yet he submitted, that if the prisoner took the articles away with the intent of keeping them in order to obtain any reward that might be offered for their restoration, and intending not to restore them unless he received such reward; that he was guilty of larceny, as he was assuming a dominion over them, and dealing with them in a manner wholly inconsistent with the *property of the prosecutor in [*247 them, who was entitled to the possession of them at all times.

(a) Cited 2 *Greav. ed. of Russ. C. M.* 15 et seq., and *Jerv. Arch.* 9th ed. p. 185.

ROLFE, B.—If a man is possessed of a chattel, he does not lose the property in it because he places or drops it in a field. Nay, if he drop it in a street, it still remains his property. The only case where a party can be justified in converting it to his own use is, where it has fallen or dropped where a party may fairly say the owner has abandoned it; or if the party cannot be found to whom it belonged. If I had an apple, and dropped it, it might be presumed that I abandoned it; but if I drop £500, the presumption is, that I do not mean to abandon it. If I drop a thing where there is no reasonable means of finding out that it belongs to me, then, though I am found out to be the owner, the party finding it would not be guilty of felony, if he converted it to his own use; though he would be liable to an action of trover. But it is perfectly well known that, if a person leave any thing in a stage-coach, if the owner can be found by inquiry, the party finding the thing, and appropriating it to his own use, is guilty of larceny. So, if it is found in a street, and there is any mark by which the owner can be discovered. So, in the case where a gold ornament is found at the door of a house, it is ridiculous to say that any person picking it up would not suppose that it belonged to the owner of the house. There are two questions here: First, did the prisoner pick the things up? Secondly, with what intention did he take up the chain, and take it to his own house? The picking it up might be the most innocent act in the world; but what does he do with it? He takes it home. Did he or not take it home with the intention of appropriating it to his own use; or did he take it home with the intention of finding the true owner? If the latter, he is not guilty. If he took it up, and did not immediately bring it to the prosecutor, in the hopes that, by coming next day, he would get a present of £5, perhaps it *248] might not amount to a larceny. If he took *it away with the intention to appropriate it, and only restored it because the reward was offered, it is clear that he is guilty of felony. Are you satisfied that he took it home, either intending to sell it, or to get a reward if one was offered? If so, he is guilty of larceny.

Greaves, for the prosecution.

Verdict—Guilty.

REGINA v. HOLMES.

A prisoner was before a magistrate, on a charge of felony, and, after the examination of the witnesses against him, the magistrate said to him, "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial."—*Held*, that this did not exclude the prisoner's statement from being given in evidence.

RAPE.—The prisoner was indicted for having feloniously ravished Mary Stait, on the 5th of October, 1843.

It appeared that at the conclusion of the examinations against the prisoner before the committing magistrate, the prisoner began to make a statement, when the magistrate said to him, "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial."

Huddleston, for the prisoner, objected that this statement was inadmissible.

Greaves.—The only proper question is, whether the words said to the prisoner had any tendency to induce him to make a false statement. Here the prisoner volunteers a statement, and is cautioned not to state any thing

that is false. The case of *Rex v. Court*, 7 C. & P. 486, is expressly in point.

ROLFE, B.—I am glad to find that there is such an authority; there are some previous cases the other way, where it was held, that it was an inducement to tell a *prisoner that it would be better to tell the truth. I [*249 think this statement admissible.

The prisoner's statement was received in evidence.

Verdict—Not guilty.

Greaves, for the prosecution.

Huddleston, for the prisoner.

REGINA v. DENT.

The money of a benefit society whose rules were not enrolled was kept in a box, of which E., one of the stewards, and two others had keys; the defendant on the false pretence that his wife was dead, which pretence he made to the clerk of the society in the hearing of E., obtained from the hands of E. out of the box £5:—*Held*, that in an indictment the pretence might be laid as made to E., and the money, the property of "E. and others," obtained from E.

The first count in an indictment described the wife of the defendant, and the third count mentioned "the said wife" of the defendant:—*Held*, that this sufficiently referred to the person mentioned as his wife in the first count.

An indictment stated, that by the rules of a benefit society, every free member was entitled to £5 on the death of his wife, and that the defendant falsely pretended that a paper, which he produced, was genuine, and contained a true account of his wife's death and burial, and that he *further* falsely pretended that he was entitled to £5 from the society, by virtue of their rules, in consequence of the death of his wife. By means of which "last-mentioned false pretence" he obtained money:—*Held*, good.

FALSE pretences.—The first count of the indictment charged, that the defendant, on, &c., at, &c., unlawfully did falsely pretend to Frederick Elsworthy, "that the wife of him, the said Robert Dent, was then dead." By means of which he obtained from the said F. E., [silver coin to the amount of 3*l.* 15*s.*] of the moneys of the said F. E., with intent to defraud F. E., whereas in truth and in fact the said wife of the said Robert Dent was not then dead, as he, the said R. D., then well knew. The second count was similar, only adding, all through it, the words "and others" after the name of Frederick Elsworthy. The third count stated, that there was a friendly society, called "The George and Dragon Friendly Society," and that the defendant was a free member of it; and that, when a free member's wife died, he was, by the rules of the society, entitled to receive £5 from the society's stock; and that F. E. was one of the stewards of the society, and that the defendant produced to F. E. a paper writing, [which was set out,] and falsely pretended to F. E. that the paper writing was a *genuine paper writing, and contained a true [*250 account of the death and burial of the defendant's wife; and *further* falsely pretended that his (the defendant's) wife was then dead, and that, as such free member, he was entitled to receive from the stewards of the society the sum of £5 by virtue of their rules, in consequence of the death of his wife. "By the means of which said last-mentioned false pretence he obtained from F. E.," [the silver coin, as before,] "of the moneys of the said F. E. and others," with intent to cheat and defraud the said F. E., and others, of the same, whereas in truth and in fact, &c., [negating the false pretences stated in this count;] and that the defend-

ant "well knew, at the time when he did so falsely pretend as last aforesaid, that each and every of the said pretences were false."^(a)

*251] "It appeared that there was a friendly society called "The George and Dragon Friendly Society," of which Frede-

(a) The third count in the indictment was in the following form:—

"And the jurors aforesaid, upon their oath aforesaid, do further present that before and at the time of the committing of the offence in this count mentioned, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, there was a certain Friendly Society, commonly called 'The George and Dragon Friendly Society,' and that the said Robert Dent was then and there a free member of the said society, and that by the rules of the said society, it was amongst other things provided, that when any free member's wife dies, such member shall be allowed £5 out of the society's stock, to wit, at the parish aforesaid, in the county aforesaid. And the jurors aforesaid, upon their oaths aforesaid, do further present, that before and at the time of the committing the offence in this count mentioned, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, the said Frederick Elsworthy was one of the stewards of the said society. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Dent being such member of the said society as aforesaid, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did produce to the said Frederick Elsworthy, so being such steward as aforesaid, a certain paper writing directed to one George Hitchings, Stoke Gifford, near Bristol, paid; and which said paper writing then was in the words and figures following, that is to say:—'London, November the 8th, 1843.—Sir, I received your letter this morning, and was sorry to state that we did not send the particulars to you in the last letter we sent. She (meaning the said wife of the said Robert Dent) died October the 18th, and was buried on Monday, 23d, at the Baptist (meaning Baptist) Chappell, in New Pye Street, Westminster, London. I hope this will find you in perfect health as it leaves us all at present. So I conclude, with kind love to you and all her inquiring friends. Please to deliver this to Mr. Robert Dent. This is to certify, that I, T. Henry Newcombe, attended (meaning attended) the funeral of Martha Dent, on the 23d day of October, being the minister of the Baptist Chappell, in New Pye Street, Westminster, London.' And the jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Dent, so being such free member of the society as aforesaid, then and there unlawfully, knowingly, and designedly, did falsely pretend to the said Frederick Elsworthy, so being such steward of the said society as aforesaid, that the said paper writing was a true, correct, and genuine paper writing, and that the same contained a true, correct, and genuine account of the death of the said wife of the said Robert Dent, and of her burial at the Baptist Chapel, in New Pye Street, Westminster, London; and that the said Robert Dent, so being such free member as aforesaid, did then and there further unlawfully, knowingly, and designedly, falsely pretend to the said Frederick Elsworthy, so being such steward of the said society as aforesaid, that the said wife of the said Robert Dent was then dead, and that he the said Robert Dent, as such free member as aforesaid, was then and there entitled to receive from the stewards of the said society, the sum of £5, under and by virtue of the rules of the said society, in consequence of the death of his said wife. By means of which said last-mentioned false pretence, the said Robert Dent did then and there unlawfully obtain from the said Frederick Elsworthy, two pieces of the current silver coin of this realm, called crowns, [describing silver and copper coins to the amount of 3*l.* 15*s.*,] of the moneys of the said Frederick Elsworthy and others, with intent then and there to cheat and defraud the said Frederick Elsworthy, and others, of the same; whereas in truth and in fact, the said paper writing was not a true, correct, or genuine paper writing; and whereas in truth and in fact the said paper did not contain a true, correct, or genuine account of the death of the said wife of the said Robert Dent, or of her burial at the Baptist Chapel, New Pye Street, Westminster, London; and whereas in truth and in fact the said wife of the said Robert Dent was not then dead; and whereas in truth and in fact the said Robert Dent, as such free member as aforesaid, was not then entitled to receive from the stewards of the said society the sum of £5, or to any other sum whatever, under and by virtue of the said rules of the said society, in consequence of the death of his said wife. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Robert Dent well knew, at the time when he did so falsely pretend as last aforesaid, that each and every of the said pretences were false; to wit, at the parish aforesaid, in the county aforesaid, against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity."

*rick Elsworthy was one of the stewards; and that the moneys of the society were kept in a box, of which Elsworthy, another [252] steward, and the landlord of the inn where the box was kept, had each keys. It further appeared, that the defendant was a free member of the society, the rules of which had not been enrolled. A printed book, containing the rules, was produced; and it was proved that a printed book of the same kind had been delivered to the defendant, who had been a member of the society for more than a year, and had paid his subscription. Upon this evidence,

ROLFE, B., held, that the book was admissible in evidence against the prisoner.

By one of the rules, every free member, whose wife died, was entitled to be paid £5 out of the funds of the society; and it appeared that the prisoner had stated to the clerk of the society that his wife was dead, and had been told by the clerk that he must produce a certificate of her burial. It further appeared that, at a meeting of the stewards and clerk, he produced the document set out in the third count of the indictment, and said to the clerk, in the presence of Elsworthy and the other stewards, that his wife was dead; the document was read by the clerk, and thereon Elsworthy took £5 out of the box, and gave it to the prisoner. Elsworthy stated that he was induced to part with the money by the certificate, and that he should not have given it to the prisoner without the certificate. Evidence was given to show that the prisoner's wife was alive, and that the statements in the certificate were false, and that the certificate was fabricated by the prisoner.

Keating, for the defendant, submitted, that neither the first nor second count was proved: as it was not the statement of the wife's death that induced Elsworthy to part with the money, but the certificate.

ROLFE, B.—I think the pretence is that the wife is dead; the certificate is only evidence of it.

**Keating*.—The pretence is laid to have been made to Elsworthy; [253] the evidence is that it was made to the clerk.

ROLFE, B.—The pretence is made, in Elsworthy's presence, to all there; that is sufficient. I am inclined to think, however, that it would have been good if it had been stated to have been made to all.

Keating.—The money is not obtained from Elsworthy.

ROLFE, B.—It is paid by the hand of Elsworthy, and he is, for this purpose, the agent of the others.

Keating.—The property is not properly laid.

ROLFE, B.—The money is in the possession of Elsworthy and the two others, who had keys; that is sufficient to support the counts laying the money as the money of Elsworthy and others.

The jury having returned a general verdict of Guilty,

Keating suggested that the first count was not proved.

Greaves.—The money was *actually* in Elsworthy's hand; that, as against a wrongdoer, is sufficient to support that count.

ROLFE, B.—I think a general verdict should be entered.

Verdict—Guilty generally.

W. H. Cooke, on the following morning, moved in arrest of judgment, on the grounds that the first two counts were too general, and did not show in what way the pretence could operate so as to obtain the money, and that the last count mentioned "the said wife" of the defendant, and that count did not state that the prisoner had a wife.

ROLFE, B.—It refers to the wife mentioned in the other counts.

*254] *W. H. Cooke.*—There are several pretences stated in the *last count, and then the count alleges, that, by means of the said last-mentioned false pretence, the money was obtained.

ROLFE, B.—What is the last pretence mentioned?

W. H. Cooke.—That the defendant pretended that he was entitled to receive £5 from the stewards of the said society, under and by virtue of the rules of the said society, in consequence of the death of his said wife.

ROLFE, B.—That is perfectly correct. The count states several things, and then concludes with a statement of that pretence, which is, in truth, the pretence whereby the money was obtained. That count is clearly good; and that, being so, it is unnecessary to give any opinion upon the others.

Greaves, for the prosecution.

Keating and *W. H. Cooke*, for the defendant.

The defendant was sentenced to imprisonment.

WORCESTER ASSIZES.

REGINA v. GEORGE BAKER.

An indictment which charges that the prisoner feloniously assaulted J. H., and by feloniously "drawing the trigger of a certain pistol, loaded with gunpowder and a leaden bullet, then and there feloniously and maliciously did attempt to discharge *the said pistol* at the said J. H.," with intent to murder him, is good, without stating that "the said pistol" was "so loaded as aforesaid."

If on the trial of an indictment for feloniously attempting to discharge a loaded pistol at another, by drawing the trigger, the jury think that the pistol was not so primed and loaded that it could go off, they should acquit the prisoner, and ought not to find him guilty of an assault under the 11th section of the stat. 7 Will. 4, & 1 Vict. c. 85.

ATTEMPTING to discharge loaded arms.—The first count of the indictment stated, that the prisoner, in and upon one John Haines, in the peace *255] of God and our said lady *the queen, then and there being, feloniously, unlawfully, and maliciously did make an assault, and by then and there feloniously drawing the trigger of a certain pistol loaded with gunpowder and a leaden bullet, then and there feloniously, unlawfully, and maliciously did attempt to discharge *the said pistol* at the said J. H., with intent in so doing, thereby then and there feloniously, wilfully, and of his malice aforethought, to kill and murder the said J. H., against the form of the statute," &c. The other counts varied the intent.

Huddleston, for the prisoner, before the case for the prosecution was opened, objected that the indictment was bad, for not averring, that at the time of attempting to discharge the pistol, it was loaded. The words "the said pistol" are words of reference merely, and not of description, and will not suffice without an averment that it was "so loaded as aforesaid."

ROLFE, B.—I think the indictment is sufficient; for it states, that, by pulling the trigger of a pistol loaded with powder and ball, the prisoner attempted to discharge *the said pistol*. That must mean, he attempted to discharge the contents of the pistol. The objection, however, is open to you on arrest of judgment.

It appeared from the evidence that the pistol flashed in the pan, but with a very faint flash, not more than would be produced by the striking of the flint and steel; it was afterwards examined, and found to be loaded with gunpowder and a piece of lead. It was admitted by the witnesses that there must have been a very small quantity of priming in the pan, if any at all.

Huddleston addressed the jury for the prisoner, and argued that the prisoner could not be convicted unless they were satisfied that the pistol was in such a state that it would go off; and that the evidence was, that there was no priming, and that the light seen by the witness was "produced by the flint alone; and that under no circumstances could the pistol have gone off in that state. He also contended, that, even if they thought the prisoner had made an assault upon the prosecutor, they might find him guilty of that, as the charge was one which included an assault. [*256

ROLFE, B., (in summing up.)—You must consider whether the pistol was in such a state of loading that, under ordinary circumstances, it would have gone off, but that from some accidental cause, the nature of which we cannot discover, it in fact did not go off. The statute under which the prisoner is indicted (7 Will 4, & 1 Vict. c. 85, sect. 3,) will then apply, for unless the statute were held to apply to cases of this kind, as well as those in which fire-arms are actually discharged, it would be absurd. The question for your consideration is, was the priming and loading of the pistol such, that, in the natural and ordinary course of things, it would have gone off? If you think it was, you must find the prisoner guilty. The learned counsel for the prisoner contends, that you may find the prisoner guilty of a common assault, but that I think you cannot do. If presenting a pistol at a person, and pulling the trigger of it, is an assault at all, certainly, in the case where the pistol is loaded, it must be taken to be an attempt to discharge the pistol with intent to do some bodily injury; that is, it must amount to the offence laid in one or other of the counts of the indictment, according as you are of opinion the intention of the prisoner was. There does not seem to be any middle kind of intent that can be suggested.

Verdict—Not guilty.(a)

Allen, for the prosecution.

Huddleston, for the prisoner.

(a) See the cases of *Blake v. Barnard*, 9 C. & P. 626; *Regina v. St. George*, Id. p. 483; and *Regina v. Oxford*, Id. p. 525.

*COURT OF QUEEN'S BENCH. [*257

Sittings in London after Hilary Term, 1844.

BEFORE LORD DENMAN, C. J.

INNES v. WYLIE and Others.

Any society may make any rules by which the admission and expulsion of its members are to be regulated, and the members must conform to those rules; but where
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there is not any property in which all the members of the society have a joint interest, and where there is no rule as to expulsion, the majority may, by resolution, remove any member; but before that is done, notice must be given to him to answer the charge made against him, and an opportunity given to him for making his defence; where, therefore, a member of such a society had used menacing language towards another member of the society, and for this a majority of a general meeting of the society voted that he should no longer be considered a member of the society, but did not give him any notice of the intention to take his conduct into consideration, or any opportunity of making his defence:—*Held*, that this expulsion was invalid, and that he was still a member of the society.

A policeman prevented a member of a society from entering the society's room:—*Held*, that if the policeman was wholly passive, and merely obstructed his entrance as any inanimate object would, this was not an assault by the policeman.

ASSAULT.—The declaration stated that the defendants, on the 30th day of November, 1843, “assaulted the plaintiff, he then being a member of a certain society of persons lawfully and voluntarily associated together, and called and known by the name of ‘The Caledonian Society of London,’ he the plaintiff then being about to enter into a certain room situated in and forming part of a certain hotel or public-house called and known by the name of Radley’s hotel, and situated in the city of London, for the purpose of attending at, and partaking of, a public general meeting and dinner of the members of the said society which was then about to be held and take place in the said room, and into which said room the said plaintiff as such member of the said society as aforesaid then was lawfully entitled and then had a legal right to enter, for the purpose of attending at, and partaking of, the said public general meeting and dinner of the *258] members of the said *society, and which said public general meeting and dinner the said plaintiff, as such member of the said society as aforesaid, then was lawfully entitled, and then had a legal right to attend and partake of, and then pushed and shoved the plaintiff from the said room, and hindered and prevented the plaintiff from entering the said room, and from attending at, and partaking of, the said public general meeting and dinner of the members of the said society, whereby the plaintiff was totally hindered, prevented, and excluded from attending at, and partaking of, the said public general meeting and dinner of the members of the said society, and from enjoying and participating in the advantages, benefits, and privileges of the said society at the said public general meeting and dinner, and other wrongs to the plaintiff then did, against the peace,” &c.

Pleas. 1st, not guilty; 2d, “And for a further plea as to the assaulting the plaintiff, and hindering and preventing him from entering the said room, and as to the pushing and shoving the plaintiff, the defendants say, that, before and at the said time when, &c., in the declaration mentioned, they the defendants were the lawful possessors of a certain room or apartment then hired by them for the use of a certain society, known as ‘The Caledonian Society of London.’ And the defendants further say, that just before and at the said time when, &c., the plaintiff having notice of the premises, and not then being a member of the said society, and being warned and requested by the defendants not to enter the said room or apartments, endeavoured, against the will and without the consent of the defendants, or any of them, or of the said society, with force and arms, &c., to enter into the said room or apartment, and would then with force and arms have entered the said room or apartment, if they the defendants had not resisted such entrance of the plaintiff into the said room or apartment; and wherefore they the defendants at the same time when, &c.,

being in the said room or apartment, did, in order to preserve the quiet possession thereof for the said society, resist and oppose the said entrance by the plaintiff into the said *room or apartment, and, in so doing, [*259 were unavoidably compelled gently to lay their hands on the plaintiff, and unavoidably a little pushed and shoved the plaintiff, and so hindered and prevented him from entering the said room or apartment, as they lawfully might for the cause aforesaid, they the defendants, on that occasion, using no violence whatever to the plaintiff, which are the same trespasses in the introductory part of this plea mentioned, and whereof the plaintiff has complained against the defendants, and this the defendants are ready to verify, &c.” 3d. “That before and after the said time when, &c., one Mr. Radley was lawfully possessed of a certain hotel, and of a certain room or apartment therein, into which said room or apartment the plaintiff, against the will of the said Mr. Radley, with force and arms, &c., endeavoured to enter, and would then have entered if they the defendants, as the servants of the said Mr. Radley, and by his command, had not resisted such entrance of the plaintiff into the said room or apartment, wherefore they the said defendants, at the said time when, &c., being in the said room or apartment, did, as the servants of the said Mr. Radley, and by his command, and, in order to preserve the quiet possession thereof for the said Mr. Radley, resist and oppose the said entrance of the plaintiff into the said room or apartment, &c. Replication, de injuriâ.

It appeared that the plaintiff had been a member of a society called “The Caledonian Society of London,” which had for its objects the extension of education in Scotland, and the preservation of the ancient Caledonian costume; and that, on the occasion of one of the dinners of the society, in the month of May, 1843, the plaintiff insisted on a seat at a particular part of the room, which being refused to him, he made use of some menacing expressions towards one of the defendants, and as the plaintiff would not apologize for this when asked to do so in the month of August, it was resolved, at a meeting of the committee of the society, held on the 9th of November, 1843, that the *plaintiff should cease to be [*260 considered as a member of the society; and this resolution of the committee was submitted to a general meeting of the society, held on the same day, at which fourteen members were present, and the resolution of the committee was confirmed by the votes of nine against five; but no notice had been given that this matter was to be taken into consideration at this meeting of the society. It appeared that the subscriptions of the members of the society became payable on the 1st of November in each year; but the second rule of the society as to its “financial department,” was as follows:—“In order to secure a full attendance of members at the dress meetings, an annual subscription of one guinea shall be payable *in the month of November*, to defray the expenses of the dinners which follow the meetings in November. Any members joining after the 30th of November, and previous to the 24th of May, shall pay the sum of half-a-guinea as their subscription for the remainder of the season.” There was no rule of the society as to the expulsion of its members; but among their rules were the following:—

“4th. No member shall be qualified to ballot for a new member, or to vote on any occasion whatever until his subscription for the current year be paid.

“6th. The committee to have full power to discuss and determine on all business connected with the society; but their proceedings to be

afterward^s subjected to the approval of the members at a general meeting.

"7th. No business shall be proposed or decided upon at any general meeting of the society, excepting only the confirmation or rejection of the proceedings of the committee, and the election of new members.

"10th. Whenever occasion shall require, a special general meeting may be held by order of the committee, not less than two days' notice of the same being given to the members of the society."

It appeared that of the nine members of the society who voted on the 9th of November for the confirmation of the *plaintiff's expulsion,
*261] only one of them had paid his subscription on the 1st of November, 1843, but that the whole of the five who voted against it had paid their subscriptions on that day.

It further appeared that the plaintiff, on the 30th of November, 1843, went to a dinner of the society at Radley's Hotel, and was prevented by a policeman named Douglass, from entering the room; and it was proved by the policeman that he acted by order of the defendants.

It was objected on the part of the plaintiff that he was a member of the society on the 30th of November, 1843, and that the defendants were not justified in excluding him from the dinner; 1st, because no notice had been given that the subject of the plaintiff's expulsion would be taken into consideration at the general meeting of the society on the 9th of November; 2dly, that the plaintiff had not been called on to make any defence or show cause why he should not be expelled; and 3dly, because, out of the nine members that voted on the 9th of November for the confirmation of the vote of the committee for expelling the plaintiff, one only had paid his subscription due on the 1st of November, and the others, therefore, were not entitled to vote or exercise any of the rights of members; and that the majority of good votes was therefore against the expulsion. With respect to the alleged assault, the policeman said, "the plaintiff tried to push by me into the room, and I *prevented* him;" but some of the other witnesses stated that the plaintiff tried to enter the room and was pushed back.

Erle addressed the jury for the defendant.—There is no assault here. The policeman who must best know what was done, says that the plaintiff tried to push into the room and he prevented him, and preventing a person from pushing into a room is no assault; the assault, if any, being rather on the other side. And even if there was an assault it was justifiable. The committee had come to a *vote that the plaintiff
*262] should be no longer a member of the society, and that vote had been confirmed at the general meeting; and with respect to the votes of the eight persons who had not paid their subscriptions, I submit that by the rules they had the whole month of November to pay them, and they were not in default till after the 30th, and were therefore members of the society on the 9th.

Lord DENMAN, C. J., (in summing up.)—I am of opinion that where there is not any property in which all the members of a society have a joint interest, the majority may by resolution remove any one member. I think that in this instance the members of this society had that power, in case the plaintiff had misconducted himself. Then had he done so? On the facts of the case, as they appear in evidence, I think that he had, by using menacing language as to one of the other members. Then what was done? There was a resolution of the committee declaring that he had ceased to

be a member of the society ; but by the regulations of the society no resolution of a committee is valid unless it has been confirmed by the general body. There was a meeting of the general body, and this resolution of the committee was considered, and it was confirmed by a majority of nine to five ; but it further appears that all the five had paid up their subscriptions before the time when that meeting took place, but that only one of the nine had paid up his subscription at the time of that meeting. It is therefore contended that the resolution of the committee cannot be considered as lawfully confirmed. However, it does not appear to me that that objection is well-founded. The subscriptions are nominally due on the first of November, but not payable till the 30th, and I think that they cannot be considered in arrear before the 30th. So far the resolution would be valid ; but I think that it was rendered altogether invalid by the want of notice to Mr. Innes of the intention to remove him from the society. It is true he was once required to apologize, *which he refused to do ; but no notice was given to him that the subject of his removal [*263 from the society was to be taken into consideration, nor was he called on to show why such a course should not be pursued. The society was, in my opinion, wrong in removing him without giving him distinct and positive notice that he was to come and answer the charge that was made against him, and I hold that he should have been told what the charge was, and called on to answer it, and told that it was meant to remove him if he did not make his defence. No proceeding in the nature of a judicial proceeding can be valid unless the party charged is told that he is so charged, is called on to answer the charge, and is warned of the consequences of refusing to do so. As no such notice was given here, I think that the removal is altogether a void act, and I am therefore of opinion that the plaintiff is still a member of the society. Being so, it appears that he went to one of its meetings on the 30th of November, 1843, and was then prevented, by a policeman acting under the orders of the defendants, from entering the room. You will say, whether, on the evidence, you think that the policeman committed an assault on the plaintiff, or was merely passive. If the policeman was entirely passive like a door or a wall put to prevent the plaintiff from entering the room, and simply obstructing the entrance of the plaintiff, no assault has been committed on the plaintiff, and your verdict will be for the defendant. The question is, did the policeman take any active measures to prevent the plaintiff from entering the room, or did he stand in the door-way passive, and not move at all.

Verdict for the plaintiff, damages 40s.

Platt, Pickering and Worlledge, for the plaintiff.

Erle and F. V. Lee, for the defendant.

*In the ensuing term, *Erle* moved for a new trial ; but the court, after taking time to consider, refused a rule ; and Lord [*264 DENMAN, C. J., said, " Any society may undoubtedly make any rules by which the admission and expulsion of its members are to be regulated ; and the members must conform to, and cannot question, them. But where there are no directions on the subject contained in the rules, a party expelled may lawfully complain, that his expulsion has been effected contrary to the general principles of law ; and a member is not to be expelled by vote, unless there be regular notice given to him, and an opportunity of his being heard. This has been the case here ; the plaintiff has been

expelled without being called on for his defence before the general meeting. This course was one which could not be legally adopted; and the trespass sought to be justified by it must be considered as illegally committed."

TURPIN v. HEALD.

Semble, that on the trial of a cause a party ought not to be allowed to go into evidence to show why he could not procure the attendance of a particular person as a witness, or to show what steps he has taken to procure such person's attendance at the trial.

ASSUMPSIT.—The first three counts of the declaration were on three policies of insurance; the first of them being on the ship "Thereza;" the second, on her furniture; and the third, on specie on board. The declaration also contained counts for money had and received, and on an account stated.

Pleas:—1st, non-assumpsit; 2d, a denial of the plaintiff's interest in the ship; 3d, a denial of the interest in the specie; 4th, that no specie was put on board; 5th, that the ship was not lost by peril of the seas; nor was the specie or furniture lost; 6th, that the ship was not sea-worthy; 7th, that the policies were obtained by fraud and wilful concealment of material information; 8th, that the loss was occasioned by the fraudulent and wilful and improper conduct of the plaintiff.

*265] It was opened by *Platt*, for the plaintiff, that Mrs. Ralph, a daughter of the plaintiff, could give important evidence as to the putting of the specie on board the "Thereza;" but that she had not arrived from Hamburg, but was expected to arrive before the present trial was over.

Mrs. Ralph not having arrived in time to be examined as a witness for the plaintiff, *Platt* proposed to call Mr. Brown, the clerk of the plaintiff's attorney, to prove what steps he had taken to procure the attendance of Mrs. Ralph at the present trial.

Lord DENMAN, C. J.—I very much doubt whether this is evidence. If we are to examine into questions why particular witnesses are not here, where are we to stop? I find this kind of examination was allowed in the Court of Common Pleas yesterday;(a) but I have the greatest doubt about it; indeed, if I were to allow this witness to be examined, the other side would very likely wish to go into evidence to show that the witness's attendance might have been easily procured.

The witness was not examined.

Verdict for the plaintiff.

Platt, E. James, and Lush, for the plaintiff.

Thesiger, and W. H. Watson, for the defendant.

(a) In the case of *Frazer, Esq. v. Bayley, Esq.*

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*JONES v. MORRELL.

A. directed a police officer to take B. into custody on a charge of embezzlement, and the officer having done so, the officer and A. went together to a box of B., and the officer, in the presence of A., searched the box, and took from it a sovereign:—*Held*, that, in an action by B. against A. for the trespass in opening of the box and taking the sovereign, proof of these facts was evidence to go to the jury of A.'s participation in the trespass.

In an action by B. against A. for false imprisonment, A. pleaded a justification, that B.

had been guilty of embezzlement. B. and his witnesses having made the charge before a magistrate, depositions were taken in the hearing of B., and he made a statement in answer:—*Held*, that, on the trial of the action for false imprisonment, these depositions, and the plaintiff's statement in answer, were receivable in evidence for the defendant, as being matters stated in the hearing of the plaintiff, to which he made an answer, but that the depositions were no proof of any fact therein stated.

FALSE imprisonment.—The first count of the declaration stated, that the defendant assaulted and imprisoned the plaintiff, and caused him to be taken to a station-house and to a police court; 2d count, that the defendant opened a certain box of the plaintiff, and took from it a sovereign; 3d count, for again imprisoning the plaintiff, and taking him to Reading.

Pleas :—1st, to the whole declaration, not guilty; 2d, to the first count, that the plaintiff had been a servant of the defendant, and had received a sum of money, to wit, 10s. 6d., by virtue of his employment as such servant, and had feloniously embezzled the same, wherefore the defendant apprehended the plaintiff; 3d, a similar plea to the third count of the declaration. Replication, *de injuriâ*.

It was opened by *Erle*, for the plaintiff, that the plaintiff had been the shopman of the defendant, who kept a bazaar at Reading, and that the plaintiff, having left the defendant's employ, and come to the house of his mother, in London, the defendant came thither with a police officer named Holland, to whom the defendant gave the plaintiff in custody, on a charge of having embezzled 10s. 6d.; and the defendant and the officer then proceeded up stairs at the house of the plaintiff's mother, and took from a box of the plaintiff a sovereign, which the plaintiff had never received back again; and the plaintiff was then taken in custody to a station-house, and thence before Mr. Broughton, the magistrate, who, having heard what the defendant had to charge against the plaintiff, dismissed the case, and discharged the plaintiff from custody. However, as soon as the plaintiff had got outside the police court, the officer, Holland, by the direction of the defendant, retook the *plaintiff, and conveyed him in custody, [*267 by the Great Western Railway, to Reading, where he was taken before the mayor, and obliged to put in bail; and, on the defendant preferring his charge against the plaintiff at the next borough sessions, at Reading, the plaintiff was acquitted.

It was proved by the police-officer Holland that he went with the defendant to the house of the plaintiff's mother, and, by the direction of the defendant, there apprehended the plaintiff on a charge of having embezzled 10s. 6d.; and that, having taken the plaintiff into custody, the defendant, the plaintiff, and himself proceeded up stairs at the house of the plaintiff's mother, when, in the presence of the plaintiff and defendant, he (the officer) searched a box, which the plaintiff then said was his, and took from it a sovereign, which he (the officer) afterwards delivered to the inspector of police at Reading. It further appeared, that the plaintiff was then taken in custody to a station-house in Robert-street, and thence before Mr. Broughton, the magistrate, at the police court in Worship-street, where, after hearing the defendant's statement, Mr. Broughton discharged the plaintiff. But it was further proved, that, as soon as the plaintiff had got outside the police court, the plaintiff was again taken into custody by the officer Holland, by the direction of the defendant, and conveyed in custody to Reading, where he was detained in custody till he put in bail.

Platt, for the defendant.—I submit that on this evidence the defendant is not liable for the taking of the sovereign. The defendant directs the officer to take the plaintiff into custody on a charge of embezzlement, and

the searching of the box, and the taking of the sovereign, were acts of the officer, for which the defendant is not liable.

*268] Lord DENMAN, C. J.—The defendant was present when *all this was done, and it is a question for the jury whether they do not consider it all the act of the defendant.

It was opened by *Platt*, for the defendant, that a French lady, named Orry, had, on the 13th of September, 1843, purchased a pair of snuffers and tray at the defendant's shop, and paid ten shillings for them, and that there being two books in the shop, one for the entry of cash received, and the other for goods sold on credit, there was an entry in the latter in the plaintiff's handwriting of "Madame Orry, snuffers and tray, 10s. 6d.," written in pencil in the handwriting of the plaintiff, but scratched through with a pen; and that when before the Mayor of Reading, when the charge was gone into, the plaintiff said, "I submit that there is no case against me."

On the part of the defendant, Madame Orry was called, and she stated, that, on the 13th of September, 1843, she paid a half-sovereign for a pair of snuffers and tray at the defendant's shop, but did not know to whom she had paid it.

Platt, for the defendant, proposed to put in the depositions taken before William Blandy, Esq., the mayor of Reading, in the presence of the present plaintiff, when the present defendant and his witnesses were examined on the charge of embezzlement, and the statement of the present plaintiff in answer to the charge.

Erle, for the plaintiff.—I submit that these depositions are not evidence. The present defendant, when he was making his charge before the magistrate, stated what he chose, and he now seeks to make that evidence for himself in this action. What the plaintiff said is evidence, no doubt, but nothing more, except as in the case of *Rex v. John*, 7 C. & P. 324, where an accused party adopted what was said by a witness in his deposition, *269] and so in effect, though not in words, *repeated what the witness had said. Here we are told that the plaintiff only said, "I submit that there is no case against me," which is nothing like an adoption of all that the witnesses have said. And even at the trial at the assizes or sessions of the same matter, which is the subject of the charge, no part of the depositions is ever given in evidence, except the party's own statement, or something else that he adopts, and in effect makes part of his statement.

Platt.—Here are certain statements made in the hearing of the plaintiff, to which he has the opportunity of making an answer, and to which he does make an answer. Now, whenever or wherever a statement is made to a party, and he makes an answer to it, both the statement made in his presence and his answer are receivable in evidence. What the effect of the evidence may be when given may much depend on what the party himself says.

Lord DENMAN, C. J.—In criminal cases, we never receive more of the depositions than what is stated by the prisoner; but here, it appears, that all that is contained in the depositions was said in the presence of the plaintiff, and he is called upon to answer it, and he makes an answer to it. I think that the depositions must be read, and the answer the plaintiff made to them; but the depositions are not any evidence of the truth of that which is stated in them.

Mr. Wells, the clerk of the Reading borough magistrates, proved that

he took the depositions against the plaintiff on the charge of embezzlement, and that the plaintiff and his solicitor were both present, and heard all that was said, and that the former, when asked if he had any thing to say in answer to the charge, said, "I submit that there is no case against me;" which statement was then taken down by him, (Mr. Wells,) and signed by the plaintiff.

*The depositions, and the above-mentioned statement of the plaintiff, were read. [*270]

It was proved, by the superintendent of police at Reading, that, at the time of the examination before the mayor of Reading, he delivered to the governor of the borough jail the sovereign he received from the officer Holland; but no further evidence was given respecting it.

LORD DENMAN, C. J., (in summing up).—With respect to the taking of the sovereign, I think that that must be considered as the act of the defendant, as the officer would not have taken it from the box but for the charge made by the defendant, and it was taken by the officer in the defendant's presence. The plaintiff is therefore, I think, entitled to a verdict for that, and for no more than that, if you think that the defendant has made out his pleas of justification; it being incumbent on the defendant, on those pleas, to satisfy you that the plaintiff, while in his service, embezzled money he received on account of the defendant. This brings us to the main question in the cause, which is, whether the defendant has proved to your satisfaction, that the plaintiff was guilty of embezzlement. Upon that part of the case you have heard the evidence. I also thought it right that the depositions taken against the plaintiff should be read, that you should hear the answer that the plaintiff made to them. However, those depositions are, of themselves, no evidence whatever of the truth of any matter stated in them, except in so much as the present plaintiff may have admitted them to be true by any thing that he himself has said. Now, all that he says, on hearing these depositions read, is, "I submit that there is no case against me;" an observation that does not appear to me at all to convey an idea that he admits all the statements to be correct, but rather puts it, that, "assuming every thing to be as stated, it does not amount to a case against me." And I think, on reading the *depositions, that the observation is well founded, and that, assuming [*271] every thing there stated to be true, they show no case of embezzlement against the plaintiff; indeed, I think it is very possible that the observation was suggested to the plaintiff by his solicitor, who appears to have been present.

Verdict for the plaintiff, damages £51; being £1 for the taking of the sovereign, and the residue for the imprisonment.

Erle and Carrington, for the plaintiff.

Platt and Petersdorff, for the defendant.

Sittings at Westminster after Easter Term, 1844.

BEFORE LORD DENMAN, C. J.

LOCKIER, Executrix of DANIEL LOCKIER v. PATERSON and Another.

4. had his goods distrained on for rent, (no rent being due,) and was obliged to pay a sum of 9*l.* 13*s.* to procure the distress to be withdrawn. A. died, and his executrix brought trespass for the taking of the goods, and the declaration stated that the goods were detained till A. paid 9*l.* 13*s.*, whereby his personal estate was diminished:—*Held*, that on this declaration the executrix could only recover damages to the amount of 9*l.* 13*s.*; and *semble*, that the executrix could not have received any greater amount if the declaration had been in any other form.

TRESPASS.—The declaration stated that the defendant, in the lifetime of Daniel Lockier, seized, took, and distrained certain goods and chattels of the said D. L., to wit, ten mahogany cigar boxes, [specifying the goods,] and detained them till the said D. L. was forced to pay divers sums *272] amounting to 9*l.* 13*s.*, “whereby the personal estate *of the said D. L. in his lifetime, and of the plaintiff as executrix as aforesaid since his decease, was and is greatly diminished and injured, to wit, to the amount of £50, and other wrongs to the said D. L. in his lifetime the defendant then did,” &c.

Plea, not guilty “by statute.”

It appeared from the evidence given on the part of the plaintiff that she was the widow and executrix of Daniel Lockier, and that the testator had rented a shop, a kitchen, and an attic of the defendant Paterson; and that, in the lifetime of the testator, the defendant Paterson had distrained on the goods of the testator mentioned in the declaration for 9*l.* 5*s.* for nine weeks’ rent in arrear, which sum, together with 8*s.* for expenses, the testator was obliged to pay to procure the distress to be withdrawn. On the part of the plaintiff it was contended that no rent was due, as the rent was payable quarterly. The defence was, that the rent was reserved weekly, and evidence was given with a view of showing that it was so.

Platt, for the plaintiff, in reply.—Upon the balance of evidence this is clearly a quarterly holding, and the plaintiff is entitled to a verdict; and as the plaintiff, as executrix, is entitled to bring this action instead of her husband, the testator, I apprehend that for the putting in of this wrongful distress you are not limited to giving a verdict for the mere sum paid to redeem the goods.

LORD DENMAN, C. J.—The declaration merely states that the personal estate of the testator was diminished, and does not state any special damage.

Platt.—If the action had been in trover, the sum paid might have been the measure of the damages, but it being in trespass, I should submit that *273] the jury may give such *damages as they think proper, on consideration of the whole of the facts of the case. (a)

(a) By the stat. 4 Edw. 3, c. 7, after reciting, that “whereas in times past executors have not had actions for trespasses done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished,” “It is accorded, that the executors in such cases shall have an action against the trespassers, to recover damages in like manner as they whose execu-

Lord DENMAN, C. J., (in summing up.)—If the rent was reserved weekly, the defendants were clearly entitled to *distrain; but if the rent was payable quarterly, the plaintiff is entitled to recover in this [*274 action. However, I am of opinion, that, if you find for the plaintiff, you can only give damages for the pecuniary amount of the loss to the testator's estate, namely, the sum of 9*l.* 13*s.*, which was paid to obtain the possession of the goods. I think that no greater sum could be recovered in an action like the present, and I certainly think that no greater amount is recoverable on this declaration.

Verdict for the plaintiff.

Damages, 9*l.* 13*s.*

Platt and Gunning, for the plaintiff.

Jervis and Bramwell, for the defendant.

tors they be should have had if they were in life." This provision was extended to the executors of executors by the stat. 15 Edw. 3, c. 5; and it is laid down in Mr. Serjeant Williams's Saunders, (edit. by Mr. Justice Patteson and Mr. E. V. Williams,) vol. 1, p. 217, n. (b), that, the stat. 4 Edw. 3 being a remedial law, it has always been expounded largely, and though it makes use of the word "trespasses" only, has been extended to other cases within the intent of the statute. "Therefore, by an equitable construction of the statute, an executor or administrator shall now have the same actions for any injury done to the *personal estate* of the testator in his lifetime, whereby it has become *less beneficial* to the executor, as the testator himself might have had, whatever the form of the action may be, Latch, 168; so that he may now have trespass or trover, 5 Rep. 27, (a) *Russell's case*, Sir W. Jones, 174, action for a false return, 4 Mod. 403, *Williams v. Cary*, for an escape, 2 Ld. Raym. 973, *Berwick v. Andrews*, debt on a judgment against an executor suggesting a devastavit, 1 Salk. 314, action for removing goods taken in execution before the testator (the landlord was paid a year's rent, 1 Str. 212, *Palgrave v. Windham*, and other actions of the like kind, for injuries done to the personal estate of the testator in his lifetime." But the statute of Edw. 3, does not extend to injuries done to the *person*, or to the *freehold* of the testator. But, with respect to injuries to the *real estate of any person deceased*, committed in his lifetime, and with respect to *certain wrongs done by a person deceased* to another in respect of his *property real or personal*, it is, by the stat. 3 & 4 Will. 4, c. 42, s. 2, enacted, "that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime; for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person."

*Sittings at Westminster after Trinity Term, 1844.

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BEFORE LORD DENMAN, C. J.

DAVIS v. LLOYD and Others.

In trespass for taking the plaintiff's goods, with a plea of not possessed, it was proposed to show that the goods were not his, by showing, inter alia, that he was not twenty-one. To show this, it was proved, that, by the custom of the law of the Jews, children are circumcised on the eighth day from their birth, and that it was the duty

of the chief rabbi to perform this rite, and make an entry of it in a book. It was proposed to give in evidence the entry in this book of the plaintiff's circumcision, the entry being in the handwriting of a chief rabbi, who was dead:—*Held*, that the entry was not receivable in evidence.

TRESPASS for taking the goods of the plaintiff.—Pleas:—1st, not guilty; 2d, that the plaintiff was not possessed of the goods.(a)

It was proved that the defendants had taken the goods in question, it being alleged by them that the goods did not belong to the plaintiff, but really belonged to his father, who had become bankrupt, and for whose assignees the defendants were acting: and in order to show that the goods were only colourably in the possession of the plaintiff, and not his property, it was proposed, on the part of the defendants, to show, that, at the time of the taking of the goods, the plaintiff was under the age of twenty-one; and in order to show this, it was proved by the secretary to the Great Synagogue in London, that, by the Jewish law, the custom is for a child to be circumcised on the eighth day after its birth; and it was also proved by the secretary that it is the duty of the chief rabbi to perform that rite, and he also produced an entry in a book kept at that synagogue in the handwriting of Dr. Herschell, who at the time of the date of the entry was the chief rabbi. This entry showed that Dr. Herschell had performed the rite of circumcision in respect to the plaintiff; and this witness stated that it was the duty of Dr. Herschell, as chief rabbi, to make such entries, and that he was dead.

*276] *Jervis, Petersdorff, and Wordsworth*, for the plaintiff.—“This entry cannot be received in evidence, it being no more receivable in evidence than a register of a Fleet marriage.(b) In the *Sussex Peerage case*, in the House of Lords, yesterday, it was held, that a declaration of a fact by a third person, which was not against his pecuniary interest, was not receivable in evidence.

Platt, for the defendant.—This is an entry made by the chief rabbi in the course of his duty; and the present case is not distinguishable, in principle, from the cases of *Doe d. Patteshall v. Turford*, 3 B. & Ad. 890, and *Poole v. Dicus*, 1 Scott, 600.(c)

Humfrey, on the same side.—As your lordship took part in the decision of the House of Lords, yesterday, in the case of the *Sussex Peerage*, may I ask, whether the house decided that, in every case in which a declaration of a third person is receivable in evidence, it must be against the pecuniary interest of the person making it; or whether the house merely decided that, in all those cases in which, to make a declaration of a third person admissible, it is necessary that it should be against the interest of the party making it, that interest must be of a pecuniary nature.

Lord DENMAN, C. J.—That case decided that, where a declaration of a third person is receivable in evidence, as being a declaration against his interest, that interest must be of a pecuniary nature.(d)

(a) There was also a third plea, on which no question of law arose.

(b) See the case of *Doe d. Davies v. Gualacre*, 8 C. & P. 578.

(c) See, also, the case of *Doe d. Haden v. Burton*, 9 C. & P. 254.

(d) In the case of the *Sussex Peerage*, (in the House of Lords, June 13, 1844,) it was proposed, on the part of the claimant, Sir Augustus D'Este, to give in evidence a declaration of Mr. Gunn, a deceased clergyman, that he had married the Duke of Sussex and Lady Augusta Murray at Rome, in the year 1793, Mr. Gunn having declined to give evidence of the facts and circumstances of that marriage in a suit in Chancery to perpetuate testimony, objecting to answer in these words:—“I object to answer that interrogatory, lest my answer should subject me to penal consequences.”

Sir T. Wilde and Mr. Erle argued that this declaration of Mr. Gunn was receivable

**Humfrey*.—The declaration offered in evidence in the *Sussex Peerage case*, being a declaration made by Mr. Gunn, that he had married the Duke of Sussex and Lady **Augusta Murray*, was not a declaration made by him in the course of his duty; and is, therefore, quite distinguishable from the present entry made by Dr. Herschell in the course of his duty, and as a part of his duty. [*277
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Lord DENMAN, C. J., (having conferred with PATTESON, J.)—I have conferred with my brother PATTESON, and we think that the evidence is not receivable.

The evidence was rejected. Verdict for the defendants.

Jervis, Petersdorff, and *Wordsworth*, for the plaintiff.

Platt, Humfrey, and *E. James*, for the defendants.

in evidence, as being a declaration made by him against his interest, because, if he feared penal consequences from having performed the marriage ceremony, it was to his interest to say that he had not performed the marriage ceremony at all. The House of Lords held, that where, in order to render a declaration of a third person receivable in evidence, it must be a declaration against the interest of the party making it, that interest must be of a pecuniary nature; and Lord Lyndhurst, C., said, that the House of Lords, in the year 1811, had, after consulting the judges, decided, in the case of the *Berkeley Peerage*, that the declaration of a deceased clergyman, that he had married the late Earl and the Countess of Berkeley, was not receivable in evidence. Mr. Gunn's declaration was therefore rejected.

The point above mentioned by Lord Lyndhurst, C., as having been decided in the *Berkeley Peerage*, will not be found in 4 Camp. 401, as the only points there reported are those decided on the 13th of May, 1811; this point having been decided afterwards, viz., on the 8th of June, 1811; but, at page 656 of the Minutes of Evidence on the *Berkeley Peerage case*, which were printed in 1811, by order of the House of Lords, there is the following report of it:—

“Die Sabbati, 8 Junii, 1811.

“Then Sir Samuel Romilly proposed to call Mrs. Tucker to prove declarations made by the late Mr. Hupsman, first, with respect to the legitimacy of the claimant; and, secondly, as to his having performed the ceremony of a marriage between the late Earl and the Countess of Berkeley.

“The solicitor-general [Sir T. Plumer] and the attorney-general [Sir V. Gibbs] were heard in objection to the evidence.

“Mr. Serjeant Best and Sir Samuel Romilly were heard in support of the evidence being received.

“The attorney-general was heard in reply.

“The counsel were directed to withdraw.

“Then it was moved that the following question be put to the learned judges:—

“‘Upon the trial of an ejectment, in which it became necessary to prove the legitimacy of A. B., the plaintiff offered to give in evidence the declarations of a deceased clergyman, who was the domestic chaplain of A. B.'s reputed father, at the time of A. B.'s birth, that he had married the reputed father and the mother of A. B. in the parish church of which such chaplain was vicar, and declarations that A. B. was the legitimate son of his reputed father. According to the practice of the courts below, would such declarations, as to the legitimacy of A. B., or the fact of marriage, be received in evidence?’

“The same was agreed to, and ordered accordingly.

“Then the Lord Chief Baron [Macdonald], having conferred with his brethren, delivered the unanimous opinion of the judges present, that such declarations as to the legitimacy of A. B., or as to the fact of marriage, could not be received in evidence.

“Then it was moved to resolve, that the evidence proposed to be offered of such declarations of Mr. Hupsman ought not to be received.

“The same was agreed to, and ordered accordingly.

“The counsel were again called in, and informed by the Lord Walsingham, that it was the opinion of the committee, that the declarations of Mr. Hupsman proposed to be given in evidence on the part of the claimant ought not to be received.”

*279] *DOE on the Demise of WILLIAM PETERS v. HONOR BRAY PETERS.

In ejectment by heir against devisee, the heir had given the devisee notice to admit documents wanted to be given in evidence, to show his title as heir. The devisee would not admit them, and the judge at chambers made the usual order as to the costs of proving these documents, whatever was the result of the cause. At the trial the devisee admitted the *prima facie* title of the heir, and the documents were not given in evidence. The defendant established the will, and had a verdict. The judge at the trial *held* that he could not certify that the documents were proved to his satisfaction according to the rule of Hilary Term, 2 Will. 4, No. 20, to entitle the heir to the costs of bringing witnesses to the trial to prove the documents.

EJECTMENT to recover a house in the parish of St. George, Bloomsbury, and a house at Kilburn, in the county of Middlesex.

The lessor of the plaintiff claimed the property as the heir of Mr. James Peters; the defendant (who was Mr. James Peters's widow) claiming it as the devisee in fee under Mr. James Peters's will.

Platt, for the defendant, admitted the *prima facie* title of the lessor of the plaintiff, as the heir of Mr. James Peters, and began.(a)

Evidence was given of the due execution of the will of Mr. James Peters, by which he devised all his real and personal property to the defendant;

And there was a

Verdict for the defendant.

S. Martin, for the lessor of the plaintiff.—My client has been put to great expense in bringing witnesses to prove documents to show his title as heir. A notice to admit these documents was given, and the defendant refused to admit any of them; and a learned judge made the usual order as to the costs of proving them, whatever the result of the present trial might be; and now, to-day, after all the expense is incurred, the defendant admits the lessor of the plaintiff's title, as heir, and the documents are not wanted at all.

*280] Lord DENMAN, C. J.—If the lessor of the plaintiff has "been put to the expense of bringing witnesses to prove documents, to show that he was the heir, he ought to have those costs; but I cannot certify to give them to him, as I cannot certify that the documents were proved to my satisfaction, because they have not been proved before me at all.

No certificate was granted.

S. Martin and *F. V. Lee*, for the plaintiff.

Platt, *Barstow*, and *D. Leahy*, for the defendant.

(a) See the case of *Doe d. Lewis v. Lewis*, ante, p. 122.

COURT OF EXCHEQUER.

First Sitting in Trinity Term, 1844.

BEFORE BARON PARKE.

TEBBUTT *v.* HOLT, Gent., one, &c.

E. having obtained a judgment against F. and T., he, by H., his attorney, sued out concurrent writs of ca. sa. into London and Surrey. F. was taken on the former writ, and, on giving to H. a promissory note jointly with B. as his surety, was discharged. No notice of this was given to the sheriff of Surrey, and he took T. on the other writ of ca. sa. In an action against H. for maliciously omitting to give notice to the sheriff of Surrey, that the judgment had been satisfied by the arrangement with F.—*Held*, that, to support this action, the jury must be satisfied that there was malice; but that to constitute malice it was not necessary that H. should have acted from any spite or ill-will, or the like, but that, if he acted as he did from any indirect motive, such as to get the debt for his client from T., or to get more costs for himself, that would be malice for this purpose. *Held*, also, that the mere fact of H. not giving notice to the sheriff of Surrey that the judgment had been satisfied was one from which alone the jury might infer malice; but that, if they thought that H. had been defrauded when he received the promissory note, or had taken it on a representation that the parties were solvent when they were not so, this would go to negative the malice.

In an action for maliciously omitting to give notice to the sheriff that a judgment had been satisfied by another co-defendant, whereby the plaintiff was taken in execution after the judgment had been satisfied, the jury found for the plaintiff, with nominal damages. The judge would not certify, under the stat. 3 & 4 Vict. c. 24, that the grievance was wilful and malicious, and would not receive affidavits either in support or in opposition to the application.

CASE.—The declaration stated that one William Eales, on the 26th day of June, 1843, had obtained a judgment *in the Court of Common Pleas against Charles Frazer, Samuel Terry, and the now plaintiff; [*281 and that William Eales, on the 26th of June, 1843, sued out a writ of *testum capias ad satisfaciendum* on that judgment against Charles Frazer, directed to the sheriffs of London, and delivered that writ to the sheriffs of London; and that William Eales, by the defendant, as his attorney, also sued out, on the 26th day of June, 1843, a writ of *capias ad satisfaciendum* on the same judgment against Charles Frazer, Samuel Terry, and the now plaintiff, directed to the sheriff of Surrey; that the two writs were concurrently in force at the same time, and that the sheriffs of London, on the 28th day of June, 1843, took and arrested Charles Frazer on the first-mentioned writ, and detained him thereon, until William Eales, by the defendant, his attorney, caused Charles Frazer to be released, whereby the judgment became and was satisfied; and that it thereupon became the duty of the defendant to give notice to the sheriff of Surrey not to arrest the plaintiff on the writ directed to him, and to take proper precaution that the plaintiff might not be taken in execution on that writ: yet the defendant, contriving, &c., “and not having then any reasonable or probable cause on that behalf, did not nor would give notice to the said sheriff of Surrey of the said arrest and discharge of the said Charles Frazer by the said sheriffs of London, or give notice to the said sheriff of Surrey, or instruct him not to execute the said writ so to him directed, or give notice to the

plaintiff that the said writ, so directed to the said sheriff of Surrey, had been issued and was in force as aforesaid, or take other due or proper means, or care, or precaution to prevent the plaintiff from being arrested and taken in execution on the last-mentioned writ, but then wrongfully, carelessly, vexatiously, and maliciously neglected and refused so to do, although a reasonable time for so doing elapsed after the said satisfaction of the said judgment, and before the arrest of the plaintiff hereinafter mentioned ;” and by reason of the premises the plaintiff was arrested by the sheriff of Surrey on the 14th of September, 1843, by virtue of the writ *282] directed to him, and detained until the 6th day of November, 1843, when he was discharged by a rule of the court of Common Pleas ; and thereby the plaintiff was obliged to incur expenses to obtain his discharge ; and by means of the premises, Moss Joel, William Peck, &c., [naming other persons,] were prevented from employing the plaintiff in his business as a house-agent and land-surveyor. (a)—Plea, not guilty.

(a) The declaration was in the following form :—

“That one William Eales, heretofore, to wit, on the 26th day of June, in the year of our Lord 1843, in the court of our said lady the queen, before her justices of the Bench, at Westminster, in the county of Middlesex, by the consideration and judgment of the same court, recovered against Charles Frazer, Samuel Terry, and the said now plaintiff, a certain debt of, to wit, £30, and also 3*l.* 10*s.*, which in and by the said court were adjudged to the said William Eales, and with his assent, for his damages, which he had sustained as well by occasion of the detaining of the said debt, as for his costs and charges by him about his suit in that behalf expended, whereof the said Charles Frazer, Samuel Terry, and the now plaintiff were convicted. And the plaintiff further saith, that the said William Eales, for having execution of the said judgment, and for no other cause of action or suit whatsoever, afterwards, to wit, on the said 26th day of June, in the year of our Lord 1843, sued and prosecuted out of the said court at Westminster aforesaid a certain writ of our said lady the queen, called a *testatum capias ad satisfaciendum*, upon the said judgment against the said Charles Frazer, directed to the sheriffs of London ; by which said writ, our said lady the queen commanded the said sheriffs that they should take the said Charles Frazer, if he should be found in their bailiwick, and him safely keep, so that the said sheriffs might have his body before her said Majesty’s justices at Westminster immediately after the execution of the said writ, to satisfy the said William Eales the debt and damages aforesaid, in form aforesaid recovered ; and that the said sheriffs should have there that writ ; which said writ, afterwards and before the delivery thereof to the said sheriffs, to be executed as is hereinafter mentioned, to wit, on the day and year last aforesaid, was duly endorsed with a direction to the said sheriffs, requiring them to levy 19*l.* 8*s.* 6*d.*, besides interest, &c. ; and which said writ, so endorsed as aforesaid, afterwards and before the said return thereof, to wit, on the day and year aforesaid, was delivered to the said sheriffs of London, to wit, John Kinnersley Hooper and Jeremiah Pilcher, Esquires, then being the sheriffs of London, to be executed in due form of law. And the said William Eales, at the same time, to wit, on the said 26th day of June, in the year of our Lord 1843, by the said defendant, his said attorney in that behalf, for having execution of the said judgment, and upon no other account, sued and prosecuted out of the said court of our lady the queen, before her justices of the bench at Westminster, upon the said judgment, a certain other writ of our lady, called a *capias ad satisfaciendum*, directed to the sheriff of Surrey ; by which said last-mentioned writ, our said lady the queen commanded the said sheriff of Surrey, that he should take Charles Frazer, Samuel Terry, and the said now plaintiff, if they should be found in his bailiwick, and them safely keep, so that the said sheriff might have their bodies before her majesty’s justices at Westminster immediately after the execution of the said last-mentioned writ, to satisfy the said William Eales the debt and damages aforesaid, in form aforesaid recovered ; and that the said sheriff should have there that writ ; which said last-mentioned writ, afterwards and before the delivery thereof to the said sheriff of Surrey, to be executed as is hereafter mentioned, to wit, on the said 26th day of June, in the year of our Lord 1843, was endorsed with a direction to the said sheriff of Surrey to levy 19*l.* 8*s.* 6*d.*, besides, &c. ; and which said last-mentioned writ, so endorsed as aforesaid, afterwards and before the said return thereof, to wit, on the said 26th day of June, in the year of our Lord 1843, was delivered to Richard Sumner, Esq., then being sheriff of the said county of Surrey, to be executed in due form of law. And the plaintiff in fact saith, that the said two writs so issued as afore-

*It was opened by *Whaleley*, for the plaintiff, that, in the month of May, 1843, a person named Eales had *recovered a judgment against a person named Frazer for a sum of 14*l.* 5*s.* 6*d.*, on which

[*283

[*284

said were issued and were in force concurrently at the same time, and for the same identical debt, demand, and cause of action. And the plaintiff further saith, that afterwards and before the committing of the grievances by the defendant hereinafter mentioned, and before the return of the said first-mentioned writ, to wit, on the 28th day of June, in the year of our Lord 1843, John Kinnersley Hooper and Jeremiah Pilcher, Esqrs., then being sheriffs of London aforesaid, by virtue of the said first-mentioned writ, within the bailiwick of them the said sheriffs of London, took and arrested the said Charles Frazer by his body, and then, by virtue of the said writ, and of the said endorsement so made thereon as aforesaid, had and detained him in their custody in execution for the said sum of money so endorsed on the said first-mentioned writ as aforesaid, besides interest, &c., and kept and detained him in their custody from thence until the said William Eales, by and through the said defendant, his attorney in that behalf, afterwards, to wit, on the 11th day of September, in the year of our Lord 1843, released and caused the said Charles Frazer to be released and discharged out of custody, in full satisfaction and discharge of the said judgment against the said Charles Frazer, Samuel Terry, and the now plaintiff, as aforesaid, whereby the said judgment became and was satisfied; of all which said several premises he the defendant then had due notice. And the plaintiff further saith, that it thereupon then became and was the duty of the defendant to give notice of the premises to the said sheriff of Surrey, and instruct him not to arrest him the said plaintiff upon the said writ so directed to the said sheriff of Surrey as aforesaid, and to take due and proper precaution that the plaintiff might not be arrested or taken in execution upon the said last-mentioned writ; and the defendant could and might and ought to have prevented the plaintiff from being taken in execution for the said cause of action: yet the defendant, well knowing the premises, but contriving, and wilfully and maliciously intending, to injure the plaintiff, and to vex, harass, oppress, impoverish, and ruin him, and to put him to great expense of moneys, and not having then any reasonable or probable cause in that behalf, did not nor would give notice to the said sheriff of Surrey of the said arrest and discharge of the said Charles Frazer by the said sheriffs of London, or give notice to the said sheriff of Surrey, or instruct him not to execute the said writ so to him directed, or give notice to the plaintiff that the said writ so directed to the said sheriff of Surrey had been issued and was in force as aforesaid, or take other due or proper means, or care, or precaution, to prevent the plaintiff from being arrested and taken in execution on the last-mentioned writ, but then wrongfully, carelessly, vexatiously, and maliciously neglected and refused so to do, although a reasonable time for so doing elapsed after the said satisfaction of the said judgment, and before the arrest of the plaintiff hereinafter mentioned, and, by reason of the several premises, he, the plaintiff, was afterwards, and after the said judgment had been and was so satisfied as aforesaid, and before the commencement of this suit, to wit, on the 14th day of September, in the year of our Lord 1843, and within the bailiwick of the said sheriff of Surrey, arrested and taken in execution by such sheriff upon and by virtue of the said writ to him directed, according to the exigency thereof, and was thereupon imprisoned and kept and detained in prison for a long time, to wit, until and upon the 6th day of November, in the year of our Lord 1843, when the said plaintiff was, by a certain rule of the said court of Common Pleas, ordered to be and was discharged from and out of the said custody of the said sheriff of Surrey, and thereby the plaintiff was forced and obliged to, and did necessarily incur, divers expenses of moneys, to wit, to the amount of £50, in and about the obtaining his discharge from the said imprisonment; and, by means of the said premises, he, the plaintiff, during his said imprisonment, suffered great pains and anxiety of body and mind, and was prevented from transacting his necessary affairs and business by him during that time to be performed and transacted; and also, by means of the premises, Moss Joel, William Peck, George King, Joseph Pizey, and David Kennedy, respectively, were hindered and prevented from employing the said plaintiff in the way of his trade and business of a house-agent and land-surveyor, and as they otherwise might and would have done but for the said imprisonment of the plaintiff; and thereby the plaintiff lost the connection of the said last-mentioned persons, and divers gains and profits which he might and would have derived and acquired from so being employed by them as aforesaid, to a large amount, to wit, to the sum of £40; and the plaintiff was and is otherwise injured and damaged—to the damage of the plaintiff of £500; and therefore he brings his suit," &c.

In the case of *Page v. Wipke*, 3 East, 314, the declaration contained a count which stated that a writ had been issued against the plaintiff at the suit of the defendant to

*285] Frazer was taken in *execution, and was in Whitecross-street
 *286] prison; and that, on the 14th of June, 1843, Eales, the plaintiff in
 that action, (the *present defendant being his attorney,) consented
 to discharge Frazer on a warrant of attorney being given to him by Fra-
 zer, a person named Terry, and the present plaintiff, to confess a judg-
 ment for £30, with a defeasance which stated the warrant of attorney to
 be given to secure 14l. 5s. 6d., payable 2l. 12s. 6d. on the 21st of June,
 and £1 on the 14th day of each month afterwards; and that, default being
 made in payment of the first instalment, the present defendant, as the at-
 torney of Eales, entered up judgment, and sued out two writs of *capias ad*

take the plaintiff; and that, before his arrest on that writ, the plaintiff had discharged
 the cause of action to the defendant, by reason whereof it became the duty of the de-
 fendant "to prevent the plaintiff, and he the defendant ought to have prevented the
 plaintiff, from being arrested;" yet that the defendant "did not in any manner prevent
 the plaintiff from being arrested," "but suffered and permitted him to be arrested." On
 this count there was a verdict for the plaintiff; and it was objected, in arrest of judg-
 ment, that this count was insufficient in not alleging malice in the defendant; and it
 was contended, that "no such action will lie for a mere non-feasance, but only on
 malice alleged and proved." The Court of King's Bench arrested the judgment, and
 Lord Ellenborough said, "Nothing wilful is alleged to have been done by the defendant,
 but only that he *suffered and permitted* the plaintiff to be arrested. Nothing is stated to
 show that this was done by way of vexation or oppression, but a mere non-feasance."
 In the case of *Crozer v. Pilling and Moore*, 6 D. & R. 129, where a defendant, being
 taken in execution under a *ca. sa.*, had tendered the debt and costs to the plaintiff's
 attorney, and required him to sign his discharge, which he refused to do until he
 had been paid an independent collateral demand for costs of opposing the defendant
 in the Insolvent Debtor's Court; and when, on the plaintiff in the original action
 being applied to, he referred to his attorney; it was held, that the plaintiff and his
 attorney were liable to an action on the case for such refusal: and it was held by
 Mr. Justice Bayley, at the trial, (malice being alleged in the declaration,) that, as
 there was no foundation for refusing the plaintiff's discharge, the refusal must be
 taken to be wrongful, and it was for the jury to determine whether it was not done
 maliciously; and, on motion to enter a nonsuit, the court refused a rule, and held,
 that the attorney on the record was the proper person to whom the debt and costs
 ought to be paid: and Mr. Justice Littleton said, "It must be presumed here that the
 refusal was malicious, inasmuch as the defendants had no right to detain the plaintiff
 in custody until he satisfied the costs incurred in the Insolvent Debtor's Court."

In the case of *Lewis v. Morris and Roberts*, 2 C. & M. 712, two concurrent writs of
ca. sa. were issued into the counties of Anglesea and Carnarvon by the defendant,
 Roberts, as the attorney of the other defendant, who was plaintiff in a former action
 against the present plaintiff. Both writs were returnable on the 2d of November,
 and the plaintiff was arrested on the 1st of November on the writ issued into the
 county of Anglesea; but the sheriff of that county, on being paid the debt and costs,
 discharged the present plaintiff out of his custody, without the knowledge or sanction
 of the plaintiff in the original action, or his attorney, and without any authority from
 either. After his discharge from that arrest, the present plaintiff went into the county
 of Carnarvon, and was again arrested on the following day upon the *ca. sa.* issued
 into the latter county, and was detained in custody about twelve days. A notice was
 sent to the defendant Roberts's office, on the 3d of November, that the present plaintiff
 had been arrested, and had paid the debt and costs to the sheriff of Anglesea, but the
 defendant Roberts was then from home. On the 9th of November, the defendant Roberts
 was again applied to by the under-sheriff of Carnarvonshire, but refused to authorize
 the present plaintiff's discharge, unless the debt and costs were paid into his hands. Some
 days after, the amount of the debt and costs, having been obtained from the sheriff of
 Anglesea, was paid to the defendant Roberts, and he thereupon gave an order for the
 discharge of the present plaintiff; and the present action being brought by the present
 plaintiff against the defendant Morris, the plaintiff in the original action, and against
 the defendant Roberts, as his attorney therein, for wilfully and maliciously neglecting
 to inform and give notice to the sheriff of Carnarvonshire that the present plaintiff had
 been before arrested in the county of Anglesea, and the judgment satisfied, it was held
 that malice was essential to the action, and that the existence of malice was a question
 for the jury; and that they having negatived malice, and found thereupon for the de-
 fendants, their finding was right.

*satisfaciendum on that judgment, the one into London, and the other into Surrey. On the former of these writs Frazer was taken [*287 on the 28th of June, and remained in Whitecross-street prison until the 11th of September following, when the present defendant, as the attorney of Eales, consented to his discharge, on receiving the promissory note of Frazer and a person named Brettargh for the sum of 21*l.* 9*s.*, dated the 11th of September, 1843, payable four months after date. Upon the taking of this note, and the release of Frazer, the judgment became satisfied as to Terry and the present plaintiff, and it became the duty of the defendant, as the attorney of the original plaintiff, to give notice to the sheriff of Surrey not to take the present plaintiff on the other writ; but, instead of that, on the present plaintiff being taken in execution on that writ, on the 14th of September, the defendant, on being applied to, would not allow him to be discharged, and he remained in custody till the 7th of November, when he was discharged by a rule of the Court of Common Pleas.

It was proved that the present plaintiff was taken on the writ of *capias ad satisfaciendum* directed to the sheriff of Surrey, on the 14th of September, and remained in custody on it till the 7th of November, and that, on the present defendant being applied to, soon after the present plaintiff was taken into custody, to consent to his discharge, he refused to do so.

The promissory note given by Frazer and Brettargh was put in and read. It was a joint and several promissory note, dated the 11th of September, 1843, for 21*l.* 9*s.*, payable four months after date. It was produced by the defendant under a notice to produce, and appeared to have not been paid when due.

E. James, for the defendant.—I submit that the plaintiff must be non-suited. This is a mere non-feasance by the defendant as an attorney. He consents to the discharge of one of three co-defendants, which, in point of law, *discharges the judgment as to all, and he then omits to give [*288 notice to the sheriff of Surrey not to execute a writ which he had against the other two defendants, and one of them is taken. In this case, it is essential that malice should be proved, but there is not the slightest evidence of it further than the arrest of the present plaintiff. It was a mere non-feasance in Mr. Holt, in not giving notice to the sheriff of Surrey that a person who was a co-defendant with the present plaintiff had been discharged.

PARKE, B.—To support this action there must be malice, and want of probable cause, but I think the case must go to the jury.

E. James addressed the jury for the defendant, and submitted that there was no evidence, at all of any malice in the defendant, and that the fact of the promissory note not being paid when due showed that the present defendant had been imposed upon when he took it, and that the present defendant thought he was taking a note which would be paid when due, whereas, in fact, he was taking a note that was really not worth the stamp, or even the paper on which it was written.

PARKE, B., (in summing up.)—This is an action for wilfully and maliciously neglecting to countermand an execution against the defendant after the debt and costs had been previously compromised on the arrest of another person in the city of London. The declaration states that a person named Eales, having recovered a judgment against the present plaintiff, and two persons named Frazer and Terry, two writs of *capias ad satisfaciendum* were sued out on that judgment, the one into London, and the

other into Surrey; that Frazer having been taken on the former writ, he was, by the defendant, as attorney of Eales, discharged; and that it was the duty of the defendant to have given notice of this to the sheriff of Surrey, *289] and *instructed him not to arrest the plaintiff, and that the defendant, maliciously and without probable cause, did not nor would give such notice and so instruct the sheriff of Surrey, by reason whereof the plaintiff was arrested by the sheriff of Surrey, and detained in custody from the 14th of September to the 6th of November, when he was discharged by the Court of Common Pleas. Now I consider the law to be, that, if a plaintiff or his attorney has received the debt and costs, in a case where the debtor had been taken in execution, it is the duty of the plaintiff or his attorney to discharge him; and so, if he tenders the amount, it is the duty of the execution-creditor, or his attorney, to discharge him, and the omission so to do is *prima facie* evidence of malice. The law also is, that, if the debt and costs are paid or satisfied, the judgment is at an end; and if the judgment be against several, the execution-creditor's discharging one of them out of custody who has been taken in execution discharges all of them. It appears here that the defendant, on the 9th of September, took the promissory note of Frazer and another person, payable four months after date, for the amount of the debt and costs. This note was a payment of the debt and costs, and was, in point of law, a satisfaction of the judgment as to all the three original defendants. And, *prima facie*, it is to be considered the duty of Mr. Holt, the present defendant, to have given some directions to the sheriff of Surrey not to proceed further against the present plaintiff on the writ which was in his hands; and it has been held that an omission by an attorney to do so is *prima facie* evidence of malice. But you must not find for the plaintiff, unless you are satisfied that the defendant was actuated by what in law is termed malice; but by the term malice, I do not mean ill-will, or revenge, or the like, but any indirect motive, such as an intention to get more costs for himself from the present plaintiff and the other original defendants, or the *290] trying to *get the debt for his client from some of these persons besides Frazer. Still, by this *prima facie* evidence of malice, Mr. Holt is called on to give some explanation, but he does not appear to give any that is very satisfactory. His counsel certainly has suggested that the note was not paid when due, and that it was a fraud upon him. Now, if the parties to this note had represented themselves to be solvent, when, in fact, they were not so; or if any other fraud had been committed on Mr. Holt, on the giving of this note, that would entitle him to verdict; but there is no evidence of this, except the mere fact, that the note is not paid when due. With respect to the time the plaintiff remained in prison, I ought to tell you that he might have procured his discharge by applying to a judge at chambers immediately after he knew that the defendant had taken this note from Frazer. If the defendant has not satisfactorily explained the matter to you, by showing you some good reason why he did not countermand this writ, I think that you ought to find for the plaintiff; but if you think that Mr. Holt, when the note was given to him, thought that it was a good note, when, in truth, it was really a fraud on him, you ought to find a verdict for the defendant.

Verdict for the plaintiff.

Whateley, for the plaintiff, applied to the learned baron to certify, under the stat. 3 & 4 Vict. c. 24, that the grievance was wilful and malicious. (a)

E. James, for the defendant.—I hope that your lordship will allow the defendant to put in an affidavit to show how the matter really arose.

* *Whateley*.—I hope that your lordship will allow me to put in affidavits. [*291]

PARKE, B.—I decline to certify, and I shall not receive affidavits.

Whateley and *Petersdorff*, for the plaintiff.

E. James, for the defendant.

(a) See the case of *Foster v. Pointer*, 9 C. & P. 718; and the case of *Swinton v. Swindell*, post.

Second Sitting at Westminster in Trinity Term, 1844.

BEFORE MR. BARON PARKE.

WILSON v. MAGNAY, Esq., and Another, Sheriff of Middlesex.

In an action against the sheriff for not taking a defendant on a ca. sa., the sheriff's officer to whom the warrant has been granted on the ca. sa. is a competent witness for the defendant, under the stat. 6 & 7 Vict. c. 85.

CASE against the defendants, as sheriff of Middlesex, for not arresting a person named Lee, on a writ of *capias ad satisfaciendum*, sued out against him at the suit of the plaintiff.—Plea, not guilty. (a)

On the part of the defendants, a sheriff's officer, named Walter, was called. He stated on the *voir dire*, that he was the officer to whom the warrant on the writ of *capias ad satisfaciendum* had been granted by the defendants; he stated that he had given the usual bond to the sheriff, but that he had not instructed or employed the attorney for the defendants in this case.

Humfrey and Wordsworth, for the plaintiff.—He is not *a competent witness; he is the real defendant, and he must repay the sheriff every thing that is incurred in this action. [*292]

Jervis and *C. R. Kennedy*, for the defendants.—This witness is rendered competent by the stat. 6 & 7 Vict. c. 85, s. 1, (b) which entirely

(a) There were other pleas, in which no point of law arose.

(b) By which it is enacted, "That no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil, or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: Provided that this act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognisance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively; provided also, that this act shall not repeal any provision in a certain act passed in the session of Parliament holden in the seventh year of the reign of his late majesty, and in the first year of the reign of her present majesty, intituled 'An Act for the Amend-

puts an end to the objection that the witness is interested in the event of the suit.

*293] *Humfrey*.—The statute does not render competent “any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part.” Here the action is substantially defended for the officer.

PARKE, B.—I think that he is a competent witness.

The witness was examined.

Verdict for the plaintiff.(a)

Humfrey and *Wordsworth*, for the plaintiff.

Jervis and *C. R. Kennedy*, for the defendants.

ment of the laws with respect to Wills: Provided that in courts of equity any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness.”

(a) See the next case.

COURT OF QUEEN'S BENCH.

Sittings at Westminster after Trinity Term, 1844.

BEFORE MR. JUSTICE WIGHTMAN.

WHEELER v. SENIOR, Esq.

In an action against a sheriff for not taking a defendant on a ca. sa., the sheriff's officer to whom the warrant has been granted on the ca. sa. is a competent witness for the defendant, and is not a person “in whose immediate and individual behalf” the action is defended, so as to come within the proviso in sect. 1 of the stat. 6 & 7 Vict. c. 85.

CASE against the defendant as the late sheriff of Buckinghamshire, for not arresting John Holland, the elder, on a writ of *capias ad satisfaciendum* sued out against him at the suit of the plaintiff.

Pleas:—1st, not guilty; 2d, that the writ was not delivered to the defendant as sheriff; 3d, that the defendant could not have taken John Holland, the elder, as in the declaration alleged.

On the part of the defendant, John Gibbs, a sheriff's officer, was called. He stated on the *voir dire*, that he was the officer to whom the warrant had been granted on the writ of ca. sa., and that he had given the usual bond to the sheriff, but that he did not defend the present action.

**Platt*, for the plaintiff.—I submit that this witness cannot be examined. He, having given a bond to the sheriff, is in reality the defendant in this action.

W. H. Watson, for the defendant.—This witness has no immediate interest in this action. If any action should be brought against him on his bond, the record in the present action would not be evidence of negligence, but merely as to the damages. There is no doubt that this witness is an interested witness, but he is nothing more than interested, and by the stat. 6 & 7 Vict. c. 85, no person who is offered as a witness is now to be rejected on the ground of either interest or crime. The witness has not even an immediate interest in the result of this trial. If a person is immediately liable, he is no doubt incompetent; but if he can only be made liable by another action being brought against him, he is not, since the statute, disqualified as a witness.

Platt.—The statute contains a proviso, “that this act shall not render competent any person on whose immediate and individual behalf any action may be either brought or defended, either wholly or in part.” Here the action is in reality defended for this witness.

WIGHTMAN, J.—I consider that this is not for the immediate benefit of the witness, as he could only be made liable through the medium of another action.

The witness was examined.

Verdict for the plaintiff, damages £150.(a)

Platt and *Gunning*, for the plaintiff.

W. H. Watson and *John Gray*, for the defendant.

(a) See the preceding case.

*MIDLAND SPRING CIRCUIT, 1844. [*295

WARWICK ASSIZES.

(*Crown Side.*)

BEFORE BARON GURNEY.

REGINA v. BENJAMIN BANNEN.

A. was indicted as a principal for feloniously making a die which would impress the resemblance of the obverse side of a shilling. A. had gone to a die-sinker and ordered four dies of the size of a shilling to be made, stating them to be for two whist clubs. One die was to be exactly like the obverse side of a shilling, another with an inscription, a third exactly like the reverse side of a shilling, and the fourth with an inscription. Before making them, the die-sinker communicated with the officers of the mint, who directed him to execute the prisoner's order, which he did, the prisoner having desired him to make the first and third before he made the other two dies, which he did, and from these counterfeit shillings could be coined:—*Held*, that A. was rightly indicted for the felony as a principal.

INDICTMENT on the stat. 2 Will. 4, c. 34, s. 10.—The 1st count of the indictment charged the prisoner with feloniously making a die which would impress the figure, stamp and resemblance of the obverse side of a shilling; 2d count, for beginning to make such a die; 3d count, for feloniously making a die which was intended to impress the figure, stamp, and apparent resemblance of a shilling.

It was proved by Mr. Charles Frederick Carter, a die-sinker at Birmingham, that the prisoner applied to him to sink dies for counters for two whist clubs, one at Exeter and the other at Blandford, stating that it was their practice to play with counters with one side resembling coins, and that they wished to have counters stamped by dies to be made in pursuance of the following written directions:—

“Four dies for whist counters, obverse head of Queen *Victoria [*296 as in the shilling coin. Reverse, Blandford Whist Club, established, 1800. Obverse, the shilling, as in coin, with wreath, &c. Reverse, Exeter Whist Club, established in 1800. The obverse to be as much a *fac simli* as can be. The letters on the reverse to vary in size. All the dies to be of the same size and fit either collar.”

When Mr. Carter considered these directions, it occurred to him that there was something very suspicious in them, and he applied to the agent of the mint at Birmingham, and communicated the order to him. The agent sent to the officers of the mint in London for instructions, and Mr. Carter was by them directed to execute the prisoner's order. He proceeded, and a long correspondence took place on account of the work not being executed within the time expected. In the course of the correspondence the prisoner desired to have the obverse of one of the pieces and the obverse of the other finished first, and they were so. When they were finished they formed the dies for the coining of a shilling; and an impression made by the dies was produced in court.

Adams, Serjt., for the prisoner, objected that the prisoner could not be convicted, as he had not himself done any thing in the construction of the dies, and that he was not answerable in this form of charge for the act of Carter. That Carter having acted under the instructions of the mint, no

felony whatever had been committed, and that the prisoner should have been indicted for a misdemeanor in exciting Carter to commit a felony.

GURNEY, B.—I shall reserve the case for the consideration of the judges.

Verdict, Guilty.

Waddington and Mellor, for the prosecution.

Adams, Serjt., and *Whitehurst*, for the prisoner.

*297] *Before Lord DENMAN, C. J.; TINDAL, C. J.; POLLOCK, C. B.; PARKE, B.; ALDERSON, B.; PATTESON, J.; GURNEY, B.; WILLIAMS, J.; COLTMAN, J.; ERSKINE, J.; ROLFE, B.; WIGHTMAN, J.; AND CRESSWELL, J.

Whitehurst, for the prisoner.—By the stat. 2 Will. 4, c. 34, s. 10, it is enacted, “That, if any person shall *knowingly* and without lawful authority (the proof of which authority shall lie on the party accused) make or mend, or begin or proceed to make or mend, or buy or sell, or shall *knowingly* and without lawful excuse (the proof of which excuse shall lie on the party accused) have in his custody or possession any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the king’s current gold or silver coin, or any part or parts of both or either of such sides,” every such offender shall be guilty of felony, and transported for life or for any term not less than seven years, or imprisoned for any term not exceeding four years. It must in this case be taken that the prisoner intended these dies to coin counterfeit shillings; but it appears, that, before Mr. Carter did any thing towards the making of the dies, he applied to the officers of the mint, and, after getting their sanction, that he made the dies. The offence is, the knowingly and without lawful authority making the die. Here, no person has without lawful authority either made or begun to make any die. The only person who did make the dies is Mr. Carter, and he had authority.

Lord DENMAN, C. J.—What was his authority?

Whitehurst.—That which he had from the officers of the mint. But I would put it thus—The officers of the mint either could give authority, or they could not. If they *could give authority, Mr. Carter had it: *298] if they could not, Mr. Carter made the die without lawful authority, and he must be presumed to know the law; and it is also clear that he did know it, and then he is guilty of the principal felony, and the prisoner was only an accessory before the fact. And if no felony was committed in the making of these dies, the prisoner is not guilty of felony even as an accessory. A person cannot be convicted of felony as a principal unless he commit it himself, or cause the commission of it by some ignorant agent; as, when an ignorant agent utters a forged note, not knowing it to be forged, or when a person mixes poison in a bowl and gives it to a servant to carry to his master, and the servant does so, and the master takes the poison and is killed: there the person who procured the uttering of the note, and the person who mixed the poison, would be the principals; but if, in the latter case, the servant knew the contents of the poisoned bowl, he would be the principal, and the person who mixed the poison would be the accessory. It is impossible to suppose that Mr. Carter did not know that the prisoner had no authority to order these dies, because he learnt

that from the mint, before he made them, and yet he makes them: he is therefore in the same situation as the servant who knows of the poison in the bowl. However, I should rather submit, that, in this case, there was no felony committed by any one, as the mint officers authorized the making of the dies. If A tells B to go into a third man's close, and before doing so B tells the third man, and the third man says, "You may go there," and B does so, this would not make A guilty of a trespass.

PARKE, B.—There would be then no trespass committed.

Waddington, for the Crown.—I admit, that, if Mr. Carter has committed a felony, the prisoner cannot be properly convicted as a principal. The first question, therefore, is, whether Mr. Carter has committed a felony.

*Lord DENMAN, C. J.—Mr. Carter is a felon if he made the dies [*299 knowingly, and without lawful authority.

TINDAL, C. J.—"Knowingly" must mean with a design.

Waddington.—It is impossible, if Mr. Carter had been tried, that he ever could have been convicted. The word "knowingly" must mean that the person knew that the die was to be used for some improper purpose, and the words "lawful authority" must be taken to mean authority from some person having jurisdiction over the matter; and I should submit, that the words "without lawful authority" do not apply to a case like the present, where the officers of the mint had authority, under the circumstances, to direct this person to go on with these dies. Then, if Mr. Carter has not been guilty of felony, the question is, whether, if a person procures a felony to be committed by one who is not guilty of felony, the person so procuring is not the principal felon. It is laid down by Mr. Justice FOSTER, (Fost. C. L. 349,) that a person, to be a principal felon, "must be present at the perpetration, otherwise he can be no more than an accessory before the fact, except in some special cases founded in necessity and political justice; I mean that justice which is due to the public, ne maleficia remaneant impunita;" and he instances the cases of poison laid for a person to take in the absence of him who laid it; poison prepared by one and administered by another, "not knowing that it was poison;" and the cases of inciting a madman, or a child not of the years of discretion, to commit a felony. Here Mr. Carter had a knowledge, but not a guilty knowledge, for, although this was a felony in the prisoner, it was not a felony in Mr. Carter.

PARKE, B.—It turns on the innocence of the agent. It is very [*300 difficult to put a case of innocence in the agent without ignorance. There can be no crime without a principal, but it is put here that Mr. Carter is innocent because he had authority.

Waddington.—If Mr. Carter, without authority, had ordered one of his workmen to make these dies, telling him that he had an order from the mint to have them made, the workman would have known that he was making dies for coin, but would have believed that he was doing right, and that he had authority, and in that case Mr. Carter would have been the principal felon, although he never touched the dies. It appears from the cases of *Rex v. Palmer*, 1 N. R. 96; *Rex v. Stewart*, R. & R. C. C. 363; and *Rex v. Giles*, 1 M. C. C. 166; that where a person procures another to commit a felony in his absence, and it be committed by a guilty agent, the person procuring it is an accessory before the fact; but if it be committed by an innocent agent, the person procuring it is a principal. It is difficult to say how the distinction of principal and accessory first arose, and why there should be no accessories in treason and misdemeanor

Mr. Justice BLACKSTONE says, (4 Bl. Com. ch. 3;) that there are no accessories in treason because the offence is so great, and no accessories in misdemeanor because the offence is so small.

ALDERSON, B.—That is no reason at all.

Waddington.—In *Regina v. Mazeau and Others*, 9 C. & P. 676, three prisoners were charged as principals with engraving plates for forged Russian notes. Two of the prisoners, Mazeau and Ramuz, actually gave orders to an engraver, an innocent agent, to engrave the plate, but the third prisoner, Rault, was not present when the order was given, though there was evidence to connect him with the transaction. Mr. Justice PATTESON, in his summing up, told the jury, that *if they were satisfied *301] that the prisoner Rault first communicated with the other two, and then that they all concurred in employing the engraver, they might all three be found guilty.

PATTESON, J.—I should like to see the indictment in that case, to ascertain whether there was any count for having the plate in their possession. It appears by my note that the plate was found in the possession of Mazeau and Ramuz; and, as Rault was acquitted, they could have been convicted on a count for that, without reference to their having caused the plate to be engraved.(a)

Waddington.—The case really turns on the distinction between actual knowledge and guilty knowledge. There is no authority in the books, and no reason for holding that a person who acts in such a way as to prevent a crime is not an innocent agent.

ALDERSON, B.—If a person desirous of stealing my horse asks my servant to let him do so, and the servant tells me of it, and I say, “Take out the horse and give it to him, and I, to confirm your evidence, will have you both taken with the horse in your possession;” and all this be done,—would this be horsestealing?

Waddington.—I should say that it would be.

ALDERSON, B.—Though the horse was sent by my order. If the person comes and takes the horse himself, it is a different matter.

PARKE, B.—If the crime is never committed at all, nobody could be *302] guilty of it. The case put by my Brother *ALDERSON would be no felony, because he voluntarily parts with his horse. If a felony is committed, some one must be the principal.

Whitehurst, in reply.—The word “knowingly” was necessary in this act of Parliament, especially as regards the possession of forged dies, as a person might have them in his shop or on his premises, and not know it. It is quite clear that Mr. Carter knew what he was doing, but he did not make the die till he had the authority of the mint. Without that authority he would clearly be guilty of felony, and the prisoner could only be an accessory. With that authority there was, as I submit, no offence at all committed.

PATTESON, J.—There was a person in the Strand some years ago employed to make a plate for forged foreign bills of exchange. The making such a plate was then a misdemeanor. I drew the indictment, and put in a count for inciting the engraver to commit the misdemeanor.(b)

(a) The indictment on which Mazeau and Ramuz were convicted did not contain any count for having the plate in their possession, but there was a separate indictment against them for having the plate in their possession, but on that indictment they were not tried.

(b) This case is alluded to by Mr. Justice Patteson, in the case of *Rex v. Butler*, 6 C. & P. 368.

ALDERSON, B.—This all turns on the question of principal and accessory. To make a person an accessory, the intermediate person must be guilty of felony. Innocent agents are not felons; and if the intermediate agent is not a felon, the person who procures the act is guilty of it as a principal.

The case was afterwards considered by the judges, who held the conviction right.

*NORFOLK SPRING CIRCUIT, 1844. [303

BEDFORD ASSIZES.

(*Crown Side.*)

BEFORE MR. JUSTICE PATTESON.

REGINA v. AMOS JANES.

A. was indicted for setting fire to an outhouse. The building set on fire was a pig-stye, situate in a yard in the possession of the prosecutor, into which yard the backdoor of the prosecutor's house opened, and which yard was bounded by fences and by other buildings of the prosecutor, and by a cottage and barn, which were let by the prosecutor to a tenant, but which did not open into this yard:—*Held*, that this pig-stye was an outhouse within the stat. 1 Vict. c. 89, s. 3.

BURNING.—The prisoner was indicted on the stat. 1 Vict. c. 89, s. 3, for having set fire to "a certain outhouse," the property of Thomas Bourn.

It was proved that the building set fire to was a pig-stye, thatched at the top, with boarded sides, having three doors opening into a yard in the possession of the prosecutor: the back of the pig-stye formed part of the fence between the prosecutor's and the adjoining property. It appeared that the state of the premises was this: first, the prosecutor's house, fronting the public road, with a backdoor opening into the yard, then a gate leading from the road into the yard, then a paled fence about two feet, then a cottage, then a barn attached to it. The cottage and barn were let by the prosecutor to a tenant. They opened to the road, and neither of them had any door or opening into the yard. Next to the cottage and barn was a stable, then a barn, then the pig-stye, all in the possession of the prosecutor, and opening into the yard. Next to the pig-stye was a paled fence, and then a live hedge round to the house, in which hedge were three gates opening into an orchard and two fields.

Prendergast, for the prisoner, objected that this pig-stye was not an outhouse within the stat. 1 Vict. c. 89, s. 3.

*PATTESON, J., reserved the case for the opinion of the fifteen judges. Verdict, Guilty.(a) [304

O'Malley, for the prosecution.

Prendergast, for the prisoner.

In the ensuing term the cause was considered by the judges, who held the conviction right.

(a) In the case of *Rez v. Stallion*, 1 M. C. C. 396, it was held, that an open shed in a farm-yard, composed of upright posts supporting pieces of wood laid across them and

covered with straw as a roof, is an outhouse within the meaning of the stat. 7 & 8 Geo. 4, c. 30, s. 2; but in the case of *Rex v. Ellison*, Id. 336, it was held, that an open building in a field, at a distance of a furlong from and out of the sight of the owner's house, though boarded round and covered in, was not an outhouse within that enactment. In the cases of *Rex v. Woodward*, Id. 323, and *Rex v. Newill*, Id. 458, questions were raised as to whether certain buildings were outhouses or not; but those cases were both decided on other points. In the case of *Rex v. Houghton*, 5 C. & P. 555, a building had been built for an oven to bake bricks, but afterwards was roofed and a door put to it. In this place, the prosecutor kept a cow; adjoining to it, but not under the same roof, was a lean-to, in which another person kept a horse. Neither the prosecutor nor the person of whom he rented this building had any house or farm-yard near it, nor did any wall connect it with any dwelling-house, the nearest dwelling being one hundred yards off, and not belonging to either the prosecutor or his landlord. Mr. Justice Taunton held, that this was neither a stable nor an outhouse; and that, if a person set it on fire, (the lean-to not being burnt,) he could not be convicted of setting fire to either an "outhouse" or a "stable." And Mr. Justice Taunton said, "I apprehend that it has been settled from ancient times, that an outhouse must be that which belongs to a dwelling-house, and is, in some respects, parcel of such dwelling-house;" "and this building being wholly unconnected with the dwelling-house, it is not included in the legal definition of out-house." And in the case of *Rex v. Parrot*, 6 C. & P. 402, Baron Vaughan was of opinion that a cart-hovel, consisting of a stubble roof, supported by uprights, in a field, at a distance from other buildings, was not an outhouse.

*305] *NORTHERN SPRING CIRCUIT, 1844.(a)

NEWCASTLE ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE COLTMAN.

REGINA v. HORNBY and Another.

A. received goods from B. (who was the servant of C.) under colour of a pretended sale:—*Held*, that the fact of his having received such goods with knowledge that B. had no authority to sell, and that he was in fact defrauding his master, was sufficient evidence to support an indictment for larceny against A. jointly with B.

LARCENY.—The indictment charged, that the prisoner Hornby and one W. G., divers quantities of yarn, (describing them,) of the goods and chattels of one W. B. P., feloniously did steal, take, and carry away, against the peace, &c.

It appeared in evidence, that W. G. was foreman in the employ of W. B. P., who was a canvas manufacturer; and that his business was, amongst other things, to give out from the warehouse of W. B. P. the yarn which was required at the manufactory, for the purpose of being wrought up into canvas. It was no part of the business of W. B. P. to sell yarn, and W. G. had no authority from him to sell that commodity. It appeared further, that the prisoner Hornby, who was a canvas weaver, had on two occasions sent his servants to the warehouse of W. B. P. for the purpose of bringing away yarn, and that, on the former of these occasions, W. G. had delivered with the yarn an invoice, which was made out

(a) Reported by John A. Russell, Esq., B. A., of Gray's Inn, Barrister-at-law.

in the name of W. B. P. With reference to the latter of these transactions, however, to which alone the charge in the indictment referred, the evidence was as follows:—On the day named in the *indictment, [*306 Hornby requested two of his workmen to go to the warehouse of W. B. P., in order to get some yarn. They went accordingly, and, on arriving at the place in question, they found Hornby and W. G. there. Certain parcels of yarn were pointed out to them, as the yarn which they were to take to Hornby's premises; and they, thereupon, in the presence of Hornby and W. G., carried away the yarn in question, which yarn was afterwards wrought up into canvas by Hornby's servants. There was no evidence of any invoice having passed between the parties in the course of this latter transaction; nor did it appear whether Hornby was or was not aware that W. G. had no authority to sell; but it was proved, that, when Hornby was charged with having been concerned with W. G. in the above transactions, he produced the invoice which W. G. had given him on the first occasion, and stated, that, except on that occasion, he had had no dealings with him.

On this evidence, it was objected, by

Foot, for the prisoner Hornby, that, as against him, the facts proved did not support the indictment. It was clear, that, so far as Hornby was concerned, the first transaction had been a *bonâ fide* purchase from W. G.; and he submitted, that, with respect to the second, there was, at least, no evidence to support the charge of larceny,—the facts proved against him amounting, at the utmost, merely to evidence that he had received the goods in question knowing them to have been stolen.

COLTMAN, J., however, told the jury, that if Hornby knew that, in the transaction in question, W. G., was in fact committing a felony, he, as well as W. G., was guilty of a felony; and that, therefore, the question for them to consider was, whether at the time of the pretended sale by W. G., Hornby did or did not know that he, W. G., was exceeding his authority and defrauding his employers. Had the transaction been accompanied with an invoice, as it was on *the former occasion, it would have been much less suspicious; because the fact of an invoice being given might [*307 easily have misled the prisoner, supposing him to have been ignorant of W. G.'s real authority. But the absence of an invoice alters the case materially. It is a suspicious circumstance for any one to buy goods to a considerable amount from the servant of a tradesman, without having an invoice in the regular way; and when we find, as in this case, that the transaction is afterwards denied, this suspicion is increased.

The jury returned a verdict of Guilty against both prisoners.

Ingham and *Granger*, for the prosecution.

Foot and *Selby*, for the prisoners.

(Civil Side.)

BEFORE MR. BARON ROLFE.

GEECKIE v. MONK.

DOE d. MONK v. GEECKIE.

If, whilst a tenant from year to year is in possession of lands under an agreement reserving a certain rent, he agrees with his landlord to pay an increased rent, this will not have the effect of creating a new tenancy.

THE former of these cases was an action of replevin. The plaintiff had become tenant from year to year to the defendant, under an agreement in writing, whereby a rent of £240 *per annum* was reserved, payable at May-day and Martinmas in each and every year of the said tenancy. One half-year's rent became due at May-day, (12th May,) 1843, and for that rent the distress was made which was the subject of this action. It appeared, however, that, in the course of the previous year, an arrangement had been *308] come to between the plaintiff and the defendant, to the effect, that the former should pay to the latter, during the continuance of his tenancy, an additional rent of £2 *per annum*. Such being the case,

Dundas, for the plaintiff, argued that he was entitled to recover in the present action. He contended, that the fact of there having been an agreement between the parties for an increased rent constituted an entirely new tenancy; and that, therefore, the defendant was not entitled to retain the distress which he had levied under the terms of the original agreement.

ROLFE, B., overruled the objection.

The next case was an action of ejectment between the same parties, and having reference to the same premises. Notice to quit had been duly served on the defendant, according to the terms of the original agreement, and on the expiration of that notice this ejectment was brought. In this case, likewise,

Dundas argued, that the agreement for an increase of rent had created a new tenancy between the parties, and that, therefore, the tenancy could not be determined by a notice to quit given under the original agreement.

ROLFE, B., however, in this, as in the previous case, overruled the objection. (a)

(a) See, also, *Doe d. Bedford v. Kendrick*, reported, Adams on Ejectment, 129.

*309] *METCALFE v. LUMSDEN.

Where A. refused to give up certain chattels when demanded by the owner, on the ground that he had purchased them from B., who was the owner's servant; and it appeared that B. had no authority to sell:—*Held*, that this was evidence of a conversion by A. although he had made the purchase *bonâ fide*, and in the belief that B. had such authority.

An authority to a servant to sell in market overt is not to be construed as a continuing authority, so as to justify a sale by him elsewhere.

TROVER for thirteen heifers.—Pleas: 1st, not guilty; 2d, that the plaintiff was not possessed; and, 3d, leave and license.

The evidence was as follows:—The plaintiff had purchased thirteen heifers, and, on the 6th of September, 1843, he had taken them to Mor-

peth-market for sale. The heifers were not sold, and the plaintiff accordingly intrusted them to one R., who was a common drover, with instructions to take them to some land belonging to the defendant, in order that they might graze there until the next market-day. This was proved to be a customary mode of proceeding on the part of farmers and cattle-jobbers frequenting Morpeth-market. R. accordingly took the cattle to the land in question; and it appeared, that, on the 7th of September, he offered to sell them to the defendant. The defendant, at first, refused to purchase them from R.; but, on the latter representing to him that he had authority from the plaintiff to dispose of them, he did purchase and pay for them at what was proved to be a fair price. R. absconded with the money. About a week after the above transaction, the plaintiff went to the premises of the defendant for the purpose of getting his cattle; but, on their being demanded from the latter, he refused to give them up, on the ground that he had bought them from R. At the time the demand was made, the plaintiff tendered to the defendant the sum due to him for agistment. R. had, in fact, no direct authority to sell the cattle in question; but the following evidence was given on the part of the defendant, for the purpose of showing that he had an implied authority to that effect. It was proved that R. had, on former occasions, sold cattle for the plaintiff in Morpeth-market, and that he had also stood in the market with the cattle in question. It was further proved to be customary for drovers to sell cattle in the *market for the farmers and jobbers by whom they were employed; but there was no evidence that R. had ever sold cattle for [310 the plaintiff, except in the market; nor was there any evidence that drovers had, by custom, an implied authority to sell cattle on the road. Under these circumstances,

Knowles, for the defendant, contended, 1st, that there was no evidence of a conversion by the defendant; and, 2dly, that R. had clearly an authority to sell the cattle in question. On the former of these points he submitted, that, in order to make a demand and refusal amount to evidence of a conversion by the defendant, it was necessary to take into consideration all that was said by him at the time such demand and refusal were made; and that as, in the present case, the ground alleged for the refusal was a *bonâ fide* purchase by the defendant of the cattle demanded, this circumstance rendered the refusal a qualified and justifiable refusal on his part. And on the second point he argued, that, under all the circumstances of the case, R. must be taken to have had an authority to sell. It was clear that he had had an authority to sell in the market on the 6th of September, and he submitted that this authority must be taken to have been a continuing authority; so that, unless the plaintiff could show that the defendant, on the 7th of September, knew that it had been determined, the property in the cattle must vest in him by virtue of the sale by R.

ROLFE, B., (to the jury).—In this case there are two questions. 1st, was there a conversion by the defendant? The answer to that is, that, if the defendant refused to give up the cattle because he had bought them, at the same time that the person from whom he bought them had no authority to sell, such refusal amounted to a conversion by him. Then, 2dly, had the drover authority to sell? An authority to sell may be either express, as when an *actual order to sell is given; or it may arise from ordinary usage, as in the case of a servant in a shop, or market, or where the mas- [311 ter has been in the habit of sending his servant to sell at a particular place. Had the defendant, therefore, purchased the cattle on the 6th of Septem-

ber in the market, he might have been protected; but, with regard to the authority which R. had on the 7th of September, the only evidence is, that he was authorized to take the cattle to depasture; and this, indeed, appears to have been, at first, the defendant's own opinion. Afterwards, however, on the drover representing to the defendant that he had authority from the plaintiff to sell, the defendant buys the cattle from him; and who then is to suffer by the drover's dishonesty? Clearly, the party who was guilty of incaution? The defendant might have ascertained whether R. had, in fact, authority to sell or not; but not having done so, and having afterwards refused to give up the cattle to the real owner, on the ground of a purchase from a party who, it turns out, had no authority to sell, he has been guilty of a conversion.(a)

W. H. Watson, for the plaintiff.

Knowles, for the defendant.

(a) And see per Lord Ellenborough, *McCombie v. Davies*, 6 East, 538, 540.

*312]

*BEFORE MR. JUSTICE COLTMAN.

FENWICK v. BELL.

In case for running down the plaintiff's ship, a nautical witness may be asked, whether, having heard the evidence, and admitting the facts proved by the plaintiff to be true, he is of opinion, that the collision could have been avoided by proper care on the part of the defendant's servants.

CASE for running foul of plaintiff's ship, whereby she was damaged, and thereby prevented from completing her cargo.—Plea, not guilty.

The plaintiff's witnesses proved that the ships of the plaintiff and defendant were respectively tacking up the river Thames on a particular day; and that, at the time they got into Gravesend-reach, the plaintiff's ship was on the larboard tack, and that the ship of the defendant was on the same tack, following in her wake. It appeared further, that, just as the plaintiff's ship had completed her tack and was putting about, and whilst she was in that position which is technically called "in irons,"—that is, having no steerage-way upon her,—she was run into by the defendant's ship. The master and crew of the plaintiff's ship stated in evidence, that they had done every thing in their power to prevent the collision; and they stated further, that, had the defendant's ship been put about sooner, as she ought to have been, the collision would not have taken place.

The master of the Trinity-house of Newcastle was then called, and the learned counsel for the plaintiff proposed to ask him, whether, according to the best of his judgment,—having heard the evidence, and admitting the facts as proved by the plaintiff to be true,—he was of opinion that a collision between the two ships could have been avoided by proper care on the part of the defendant's servants.

Dundas, for the defendant, objected, that this question could not be put, inasmuch as it was the very question which the jury were to try.

*313] *COLTMAN, J., however, overruled the objection, and allowed the question to be put, on the ground that it was a question having reference to a matter of science and opinion.(a)

Wortley and *W. H. Watson*, for the plaintiff.

Dundas and *Knowles*, for the defendant.

(a) But see the recent case of *Sills v. Brown*, 9 C. & P. 601. That case, like the one

in the text, was an action for running down the plaintiff's vessel; and, in the course of the cause, a witness was asked, whether, having heard the evidence, he thought the conduct of the captain of the defendant's vessel *was right or not*. To this question the counsel for the plaintiff objected, on the ground that it was putting the witness in the place of the jury. On the other side, it was contended, that it was a matter of skill; that the parties could not get a nautical jury; and that the case then under consideration was similar to those in which a medical question arises, and witnesses are asked, whether, in their opinion, the treatment was correct or not. COLKINS, J., however, who tried the cause, would not allow the question to be put, stating, that he did not think that the witness could be asked to draw a conclusion of fact, and then to give his opinion upon it. It is submitted, however, that the correct doctrine is that laid down in the case reported in the text; and that, in "running-down causes," as well as in all others, Lord Ellenborough's opinion holds good, namely, that, when there is a matter of skill or science to be decided, the jury may be assisted by the opinion of those peculiarly acquainted with it, from their professions or pursuits. (*Beckwith v. Sydebotham*, 1 Camp. 116, 117.) It seems to be a mistake to say, that, in putting such a question to a witness as was put in the above case of *Fenwick v. Bell*, you submit to his decision a point which the jury alone can try. On the contrary, it is submitted, that the object of putting the question is not at all to decide upon the fact itself, but to prove an entirely new fact, namely, the opinion of a person of competent skill, as to what might or might not have been done by the parties under a given state of circumstances. The jury are, of course, to decide upon the value of this opinion, as well as upon the value of the evidence on which it is founded; and thus, it is plain, that, in the end, the whole matter is submitted to their consideration; and that the only effect of the evidence of opinion will be, to assist them in judging of a question of which the witness may reasonably be supposed, on account of his professional knowledge, to have been more competent to judge than they themselves.

*DURHAM ASSIZES.

[*314]

(Civil Side.)

BEFORE MR. BARON ROLFE.

DALE v. HEALD.

A defendant cannot be presumed to know what evidence will be required until after issue joined; and, therefore, where it appeared, that, between that time and the first day of the assizes, due diligence had been used to procure the attendance of a material and necessary witness, but without effect, the judge ordered the trial to be put off, on the defendant bringing the money into court and paying costs.

THIS was an action on a policy of insurance, in which notice of trial had been given for the Durham Spring Assizes, 1844. At the sitting of the court on the first morning of the assizes,

Knowles, for the defendant, applied to put off the trial until the next assizes, on an affidavit, which stated, that issue in the cause had been joined on the 23d of February, 1844; (which was just in time to allow of notice of trial being given for the assizes;) that the action involved a question of French law; and that, after issue joined, a messenger had been sent to France for the purpose of procuring the attendance of a material and necessary witness, which messenger had not yet returned.

Temple, for the plaintiff, opposed the application, on the ground that the attendance of the witness might have been procured at an earlier period.

ROLFE, B., however, was of opinion, that a party could not be presumed to know what evidence he would require until after issue joined, which in

this case had been done just in time to admit of notice of trial being given for the assizes; and as there appeared to have been no delay on the part of the defendant in procuring the attendance of the witness in question, he accordingly allowed the application, on condition of the defendant bringing the money into court, and paying costs.

*315] **Temple*, for the plaintiff.
Knowles, for the defendant.

ALLEN v. YOXALL.

A., a railway contractor, met B., and several others, in order to receive tenders with reference to certain work. A. then read a specification with reference to the work in question; after which B. and the others handed in their tenders. B.'s tender was signed with his name, but there was no evidence that it was in his handwriting:—*Held*, notwithstanding, that such tender, taken with the specification, sufficiently proved the contract.

A witness who is subpoenaed by both parties in a cause, is entitled to have all his expenses paid by the party who calls him at the trial, although the other party may have been the first who subpoenaed him.

ASSUMPSIT for work and labour.—The defendant pleaded *non-assumpsit*, and several other pleas, on which no question arose. There was also a plea of payment of money into court.

It appeared that the defendant was a railway contractor, and that he had employed the plaintiff to do certain work on the Great North-of-England Railway. It appeared further, that the plaintiff had performed the work in question, but that, after he had so performed it, a dispute arose as to the rate of payment.

In order to prove the contract under which the work was done, a witness was called whose evidence was as follows:—He stated that he was present together with the plaintiff, the defendant, and some others, when some talk took place, and a specification was read with reference to the work in question; that thereupon the plaintiff and the others handed in tenders for the said work to the defendant, and that the plaintiff's tender was then opened and read. On the specification being produced, the witness identified it as being in the handwriting of the defendant, but it was not signed by him. The tender was then shown to the witness, and identified by him; it was addressed to the defendant, but, although it was signed with the plaintiff's name, the witness could not say whether the signature was actually in the handwriting of the plaintiff or not. He had no doubt, however, but that the tender then produced was the tender which, on the occasion in question, the plaintiff had handed to the defendant.

*316] On this evidence it was objected, on the part of the *defendant, that there was no proof of the contract between the parties, inasmuch as it did not appear that the tender now produced was in fact the tender of the plaintiff.

ROLFE, B., however, overruled the objection, on the ground, that if, after the specification had been read in the hearing of the plaintiff,—as the witness had stated,—the former had assented to it verbally, that would have been sufficient to show a contract on his part; and the learned baron was of opinion that this was a similar case. He was likewise of opinion, that there was sufficient evidence of the defendant's having accepted the

plaintiff's tender on the terms of the specification, and that, therefore, the contract between the parties was fully proved.

In the course of the cause a witness was called who objected to give evidence unless his expenses were paid. It appeared that the witness had been subpœnaed by both parties,—by the defendant on the day of the trial, and by the plaintiff on the day before. He was called by the defendant.

Granger accordingly submitted, that the witness had no claim against his client, except for the expenses incurred since the service of his subpœna, and that for his expenses prior to that time the plaintiff only was liable.

ROLFE, B., however, stated his opinion to be, that, although a witness were subpœnaed by both parties in a cause, he was still entitled, before giving evidence, to be paid all his expenses by the party who called him at the trial; and he ordered payment of the witness's expenses accordingly.

Dundas, for the plaintiff.

Granger, for the defendant.

*FAIRBRIDGE v. PACE.

[*317

Where, by the terms of a charter-party, a ship is to proceed to a certain port, and there to load a full cargo for the agents of the freighter, but the freighter has no interest in the outward cargo, his agents are entitled to notice from the captain, that the vessel is ready to receive her homeward cargo; and if no such notice be given, the freighter is not liable for not providing such cargo.

THIS was an action to recover the penalty on a charter-party.—It appeared that the plaintiff was the owner of a brig called *The Mary*; and that the defendant, who was a ship-broker, had, on the 21st of August, 1840, chartered that vessel on a voyage to Stettin and back. By the terms of the charter-party, *The Mary* was to load at Stettin a full cargo of corn for the agents of the freighter, and, being so loaded, she was to proceed to certain ports therein named. Twenty-five running days were to be allowed for discharging and loading the vessel at Stettin; and for every day she was detained beyond that time, demurrage was to be charged at the rate of £3 per day. The ship was to be addressed to the merchants' ship-broker at Stettin. It appeared further, that, shortly after the date of the charter-party, *The Mary* set sail for Stettin with a cargo, (in which cargo, however, the defendant Pace had no interest;) that, on her arrival at Stettin, she was duly reported at the custom-house; that the outward cargo was thereupon discharged, but that no return cargo was provided by the agent of the freighter, according to the terms of the charter-party; and that the captain, after having incurred sixteen days' demurrage, had at length re-chartered his ship with a cargo of corn for Leith. Under these circumstances the owner brought his action on the charter-party.

In the course of the trial a good deal of discussion took place, and conflicting evidence was given on two points: 1st, as to the kind of notice of the ship's arrival to which the agents of the freighter were entitled; and,

2dly., as to whether the captain had, in fact, used due diligence to discover those agents, and to give them such notice; and

Dundas, for the plaintiff, referred to the cases of *Harman v. Clarke*, 4 Camp. 159, and *Harman v. Mant*, 4 Camp. 161, in order to show *318] that it was no part of the captain's duty to give to the freighter's agents any notice of the ship's arrival, but that, on the contrary, they were bound to take notice of that event. He admitted, that, in the cases cited, the question had been between the master of the ship and the consignor of the goods; but still he contended that the principles therein laid down were equally applicable to the present case, and that, therefore, as the agents of the freighter had not furnished a cargo in terms of the charter-party, the defendant was liable in this action.

Knowles, contra, submitted, that that was not the question. The defendant, it was said, had engaged to find a cargo at Stettin; but the obligation of the defendant to load such cargo did not arise until the ship was ready to receive it; and, as the defendant's agents had nothing to do with getting the ship ready, he submitted, that, whatever might be the duty of the captain as to giving notice of the ship's arrival, it was clearly his duty to have given notice to the defendant's agents that the ship was ready to receive her cargo.

ROLFE, B., (in summing up.)—The question is, did the captain, or did he not, fail to get a cargo by reason of the default of the defendant? The cases cited by the learned counsel for the plaintiff do not apply. Pace had nothing to do with the outward cargo. Of the arrival of the ship the agents of the defendant may have been bound to take notice; but of the time at which the cargo was discharged they could know nothing, and they were, therefore, entitled to notice of that fact from the captain.

Dundas, for the plaintiff.

Knowles, for the defendant.

*319]

*KIRTLEY v. COPELAND.

Where issue is taken on an averment in a declaration, that the plaintiff was "ready and willing and able," to do a certain act, the defendant may show thereunder any circumstance—such as the insanity of the plaintiff—which disqualified him from doing the act in question.

ASSUMPSIT on an agreement, whereby the defendant agreed to purchase from the plaintiff a house and the goodwill of a business. The first count of the declaration alleged, that, from and after the making of the said agreement, the plaintiff "was ready and willing and able" to execute the necessary assignment to the defendant; and the breach was, that the defendant would not accept the same.

To this the defendant pleaded, *inter alia*, that the plaintiff was not "ready, nor willing, nor able" to execute the said assignment in manner and form as in the declaration alleged.

The evidence given on the part of the plaintiff was quite conclusive as to the fact of the agreement having been entered into, and also as to the refusal of the defendant to accept the assignment. In opening his case to the jury, however,

Granger, for the defendant, stated, that he would prove, that, at the time mentioned in the declaration, the plaintiff was labouring under a de-

gree of mental derangement, which was sufficient to incapacitate him from executing any assignment which would be valid in law.

Knowles, for the plaintiff, objected to these facts being opened to the jury; and he also contended, that the evidence proposed to be given on behalf of the defendant was inadmissible.

Granger, contra, submitted, that, according to the form of the issue which was raised on the first count of the declaration, he was clearly entitled to give the evidence in question. He contended, that, even if the averment in the declaration had been merely that the plaintiff was "ready and willing" to execute the assignment, he would still have been [320 entitled, under a plea which traversed that averment, to have given evidence of the defendant's mental incapacity; and that, *à fortiori*, he was entitled to give such evidence in this case, inasmuch as here the declaration alleged, not only that the defendant was "ready and willing" to execute such assignment, but also, that he was "able" so to do.

ROLFE, B.—Of course, if you can show that the plaintiff was unable, from any cause, to execute the assignment, you are entitled to do so under this issue. (a)

Knowles, for the plaintiff.

Granger, for the defendant.

(a) See also the case of *De Medina v. Norman*, 9 M. & W. 820, in which it was held, on general demurrer, that the averment of the plaintiff's readiness and willingness to grant a lease, was equivalent to an averment of his having title to grant it, on the ground that the words "ready and willing" implied not only the disposition, but the capacity, to do the act in question.

TOPHAM and Wife v. M'GREGOR and Wife.

A witness, who states that he had at one time received a number of letters from one of the parties in a cause, containing statements with reference to a particular fact, but which letters he had since destroyed, cannot be examined as to the general contents of such letters, for the purpose of ascertaining the impression thereby produced in his mind with reference to the fact in question.

The editor of a newspaper swore that A. was the writer of a certain article which had appeared in that paper many years before, and that the MS. had been lost. A. stated that he had been in the habit of writing such articles for the newspaper in question, but that he had no recollection of having sent the particular article now referred to. He swore, however, that all the statements made in the articles he did send were true:—*Held*, that the newspaper might be put into A.'s hand, in order to refresh his memory; and that he might be asked, whether, looking at the article, he had any doubt that the fact was as therein stated.

THIS was an issue out of Chancery, to try the validity of the last will and testament of one Richard Wrightson.

The testator had, by his will, made in the year 1829, *devised [321 all his property, real and personal, to his then wife, who, after the death of the testator, had intermarried with the plaintiff Topham. The wife of the defendant M'Gregor was the sister and heir-at-law of the testator; and, in the year 1842, she and her husband filed a bill in Chancery for the purpose of setting aside the said will, on the ground that, at the time the will was made, the testator had not a sound and disposing mind and memory. It was to decide this question that the present issue was directed to be tried.

In the course of the cause, it became material for the plaintiffs to show

the terms on which the testator and his sister (Mrs. M'Gregor) had lived together; and, in order to prove this, a witness was called, who stated that the defendant Mrs. M'Gregor had corresponded with him for a considerable time prior to the death of her brother the testator. These letters, however, he further stated, had been long since destroyed. He was then asked by the plaintiff's counsel as to what were the general contents of those letters, and as to the impression thereby produced on his mind, with reference to the degree of friendship which subsisted between the testator and his sister.

Kelly, for the defendants, objected to this question; and he contended, that, although the witness might be examined as to the contents of any particular letter, yet that he could not be examined as to the general contents of all.

ROLFE, B., allowed the objection, and the question was accordingly withdrawn.(a)

*322] *In the course of the trial, one of the witnesses stated that she knew that a certain circumstance, with reference to which she had been examined, occurred at the time mentioned by her, (namely, in the month of March, 1830,) because she remembered, that, some time during that month, the weather was for several days extremely warm for the season of the year; and because she knew that it was whilst the weather was in this state that the occurrence of which she was called upon to speak took place. In order to corroborate her testimony as to the peculiar state of the weather at the period mentioned, it was proposed to read an article from a newspaper, which had been published at the time, and which contained a statement confirmatory of the witness's evidence. This having been objected to, the gentleman who had edited and published the newspaper was called, and he stated that the article referred to had been furnished by a gentleman who had, in the year 1830, and for some time previous, been in the habit of writing such articles for the newspaper in question; he likewise stated that the manuscript of the said article had been diligently searched for, but that it could not be found. The writer of the article was then called, and he stated that he had no recollection of having communicated the particular article referred to; he stated, however, that, at the time mentioned by the editor, he had been in the habit of furnishing him with articles with reference to phenomena connected with the weather, and he swore that the statements contained in those articles were invariably true.*

Kelly then submitted that the article should be read.

*323] **Knowles* objected that the article could not be read, because it amounted to mere evidence of a declaration by the witness, which could not be evidence in the cause.

ROLFE, B., however, thought that the article might be used for the purpose of refreshing the witness's memory; and that he might be asked,

(a) It would appear, however, that in some cases a witness may be examined as to the general result of a series of documents not produced in evidence. See *Roberts v. Dixon*, Peake, N. P. C. 84, and *Spencer v. Billing*, 3 Camp. 310. But between the cases referred to and that reported in the text there seems to be this distinction: namely, that in the former the witness had only to speak to one particular fact, which was apparent on the face of the documents themselves; whereas, in the latter, had the question put been allowed, he would necessarily have given in evidence his own inference, drawn from the statement of a number of facts contained in the letters in question; or, in other words, he would have given in evidence his construction of those letters, and would thus have been put in the place of the jury who were trying the cause.

whether, looking at the article in question, he had any doubt that the fact really was as therein stated.

Knowles, Wortley, and Addison, for the plaintiffs.

Kelly, Martin, and Crompton, for the defendants.

BEFORE MR. JUSTICE COLTMAN.

DOBBIN v. FOSTER and Others.

A., B., and C., who were copartners, engaged D., by agreement in writing, to serve them for a certain period. Before this period had elapsed, C. retired from the concern, and D. with notice of that fact continued in the service of A. and B.; A. and B. subsequently became bankrupt, whereupon D. was dismissed from their employment:—*Held*, that D. could still sue A., B., and C. on the original agreement.

THIS was an action on an agreement by the defendants to employ the plaintiff as their foreman for twelve years; and the breach alleged was, that the defendants had refused so to employ the plaintiff.

The defendants pleaded, 1st, *non assumpserunt*; 2dly, that they did not refuse to employ the plaintiff; and, 3dly, that the agreement had been rescinded by mutual consent.

In the month of July, 1838, the defendants, namely, Foster, Stafford, and Horner, were engaged as copartners in the trade of sail-cloth manufacturers; and by an *agreement in writing, made in the same [324 month of July, they engaged to employ the plaintiff, and he engaged faithfully to serve them, as their foreman, for twelve years, at a salary of two guineas a week, with certain perquisites. In the year 1843, however, the firm got into difficulties, and, in consequence thereof, the concern was closed. A fiat in bankruptcy was afterwards sued out against the firm, and notice was thereupon given to the plaintiff by the assignees, not to come again upon the premises. It appeared further, that, in the month of November, 1838, the partnership of Foster, Stafford, and Horner had been dissolved, by the retirement of Horner from the concern, and that the business was thereafter carried on in the names of Foster and Stafford only. Accordingly it was contended, by

Watson and Temple, for the defendants, that the plaintiff could not maintain his action on the original agreement with Foster, Stafford, and Horner. They argued, that, when the partnership was dissolved, Foster and Stafford took to the business; and that as the plaintiff, with knowledge of this fact, still continued to serve the new firm, the first agreement was put an end to, and another agreement must be presumed to have been entered into between the plaintiff and Foster and Stafford only. Under these circumstances, they argued that the defendants were entitled to a verdict on the third plea.

Granger, contra, contended that the third plea was not made out.

COLTMAN, J.—The only answer to this action is, that the parties agreed to put an end to the original contract. I am of opinion, however, that this defence is not made out. Horner's going out of the concern did not, *per se*, put an end to the agreement; and as, by that agreement, the plaintiff had engaged to serve for a certain period, it *appears [325

to me that he was bound to continue in the service of Foster and Stafford, and that, therefore, it cannot be implied from this circumstance that the original contract was rescinded.

Granger, for the plaintiff.

W. H. Watson and *Temple*, for the defendants.

WHITFIELD v. COLLINGWOOD and Another.

Where, after a bill has been accepted, and before it is delivered to the drawer, an alteration is made by a third party in the date thereof, it is for the jury to say,—judging from all the circumstances of the case,—whether such third party made the alteration in question with the acceptor's consent, or as his agent; and in either case the acceptor will be liable.

This was an action of *assumpsit* by the drawer against the acceptors of a bill of exchange. The only material plea was, that the defendants did not accept the said bill.

A witness of the name of Dickinson was called, who stated, that, on Sunday the 25th of July, 1843, he wrote the body of the bill in question, and affixed the date thereto, namely, the 25th of July aforesaid, and that after he had done so, the defendant Collingwood signed the bill as acceptor. The witness further stated, that, after the bill had been so accepted by Collingwood, he went with the latter to Dichburn, the other defendant, for the purpose of procuring his acceptance to the bill; and that the latter then accepted the said bill accordingly. No remark was made at that time about the date of the instrument; but it appeared that, on the morning of the following day, the witness Dickinson called at Dichburn's house, and that in the course of a conversation which then took place respecting the bill in question, the latter said, that if the bill was dated on a Sunday it would not be right, and, that, on that account, the date had better be altered from the 25th to the 26th of July. The alteration was accordingly made in the presence of the witness, and he then took the bill to Whitfield, who put his name thereto as drawer. Dickinson further stated, that he afterwards mentioned the alteration to Collingwood, and that he did not recollect that the latter had made any objection to it.

*326] *Warren*, for the defendants, objected, that the evidence given by the plaintiff did not sufficiently account for the alteration which had been made in the date of the bill; and he contended that the instrument was therefore vitiated, so that the plaintiff could not recover.

Sed per COLTMAN, J.—It is for the jury to say, whether they are satisfied that the bill was altered with the consent of Collingwood before it was delivered to the drawer, or whether, throughout the transaction, the witness Dickinson acted as Collingwood's agent. In either case they must find for the plaintiff.

Verdict for the plaintiff accordingly.

Atherton, for the plaintiff.

Warren, for the defendants.

LIVERPOOL SPRING ASSIZES, 1844.

BEFORE MR. BARON ROLFE.

BENTLIFF v. GARNETT.

In order to set aside a sale of goods, *quoad* the purchaser, on the ground that it was made with the intention of defrauding the creditors of the seller, it must be shown that the purchaser was aware of that intention, and that he conspired with the seller to carry it into effect.

TRESPASS for breaking and entering the dwelling-house of the defendant, and taking away his goods, &c.—Pleas—1st, not guilty; 2dly, that the plaintiff was not possessed, &c.; 3dly, a justification by the defendant *under a writ of *fiery facias* directed to the sheriff of Cheshire. [*327]

The principal facts of the case were as follow:—It appeared that one Wright had, during the year 1843, kept a public-house at A., in which a lodge of the society called Druids were in the habit of assembling, and that, amongst other furniture which was provided for the use of the said lodge, there was an organ, which organ formed the subject of the present action. It was proved that Wright had bought the organ in question in the month of July or August, 1843. Between that time and the month of November following, Wright became much indebted to various persons; and on the 10th of that month one of his creditors sued out a writ of *fiery facias* against him, under which the sheriff entered and seized his goods. At the time the seizure was made, the organ was not on Wright's premises. The fact was, that it had, for some time prior to the issuing of the *fiery facias*, been in the house of Bentliff, the plaintiff in the present action, and evidence was given to show that Bentliff had bought it from Wright on the 14th of October previous. It appeared, further, that the sheriff's officer was aware that the organ had been removed to Bentliff's house, and that accordingly he went thither and seized it under the execution against Wright. This was the trespass complained of.

The defence set up on the part of the sheriff was, that the sale to Bentliff was fraudulent, inasmuch as it had been made for the purpose of defrauding the creditors of Wright; and that the plaintiff had, in consequence, no title to recover.

ROLFE, B., in addressing the jury, said—It must be shown that there was a conspiracy between the purchaser and the seller of the goods in question, for the purpose of defrauding the creditors of the latter, before a sale of those goods can be set aside as fraudulent on that ground, *quoad* the purchaser; and, therefore, if the money produced by such *sale [*328] was merely to go into the hands of the seller, even although it might afterwards be paid to a favoured creditor, still this would not be sufficient, *per se*, to constitute a fraudulent sale. Admitting, then, that there was an intention on the part of Wright to defraud his creditors by means of the sale to the plaintiff, you must, in order to set aside that sale *quoad* the plaintiff, be satisfied that he conspired with Wright to carry that intention into effect.

Baines and Greene, for the plaintiff.

Martin and Cowling, for the defendant.

RICHARDSON v. CARTWRIGHT.

A. was the owner of a saw-mill, and B. was his foreman. B., as the agent of A., but without any express authority, entered into a contract in writing to supply C. with a quantity of Scotch fir staves:—*Held*, that this contract was binding on A., inasmuch as B. must be presumed to have had a general authority to enter into such contracts as the one in question.

THIS was an action on a contract by the defendant to furnish the plaintiff with a large quantity of Scotch fir staves; and the breach was, that the staves had not been furnished by the defendant according to the said contract.

It appeared that the defendant was the owner of a saw-mill, and that one Walworth was his foreman. The contract on which the present action was brought had been entered into by Walworth, as the agent of the defendant; and the great point made in defence was, that that contract was not binding on the defendant, inasmuch as Walworth had no general authority, as the foreman of the latter, to enter into such a contract; and that neither was there any evidence that he had had a special authority to enter into the particular contract in question.

ROLFE, B., however, in summing up, told the jury that he was of opinion, that a foreman who was employed to conduct a business such as that *329] in which the defendant *was engaged, must be taken to have a general authority to bind his master by such a contract as the one now under consideration.

Brandt, for the plaintiff.

Baines and Crompton, for the defendant.

KERSHAW v. JOHNSON the elder and JOHNSON the younger.

An inspector of weights and measures, appointed under the 5 & 6 Will. 4, c. 63, does not require a special warrant, in order to authorize him to act in each individual case, his general warrant under sect. 28 being sufficient for that purpose.

By sect. 21, of that act, no weight above 56 lb. is required to be inspected and stamped; but the inspector may still enter places within the meaning of the act, in order to inspect, &c., although no weight of 56 lb. or under be kept therein.

Under the 28th section, an inspector is not authorized in seizing any weight, without having first compared it with the standard, in order to ascertain whether it be just or not.

Semhle, that it is not necessary, in order to justify an inspector in entering under the 28th section, that the place into which he enters should be one in which goods are actually "exposed or kept for sale." If he have good reason to believe that it is so, and the entry be made *bonâ fide* under this belief, that will be sufficient.

TRESPASS for breaking and entering the dwelling-house of the plaintiff, and taking a 60-lb. weight therefrom.—The defendant pleaded payment into court of the sum of £2 in satisfaction, and alleged that the plaintiff had sustained no damages *ultra*. Issue thereon.

The evidence in the case was as follows:—The defendant Johnson the elder was the inspector of weights and measures in Rochdale. The plaintiff had been a green-grocer in that town, but had retired from business, and was, at the time the trespass complained of was committed, residing in what seemed to be a private house. On the 3d of January, 1844, Johnson the elder met the plaintiff's son in the shop of one H., in the town of Rochdale, and he then told the latter that it was his intention to inspect

his father's (the plaintiff's) weights. The *answer to this intimation was, that the plaintiff had no weights, that he did not carry on any business, but that he (the son) carried on the business on his own account, and that Johnson might inspect his weights if he chose. The plaintiff's son then left the shop in which he had met the elder defendant, and went towards his father's house. The defendant followed, and insisted upon entering the house; and this he ultimately accomplished in company with his son, who was the other defendant in this action. Immediately on the defendants' getting into the house, they commenced searching for weights; and after they had gone into several rooms for that purpose, they at last found a 60-lb. weight behind a door; and this weight they seized and carried away with them, without having previously tested it, in order to ascertain whether it was a just weight or not. [*330]

The witnesses for the plaintiff stated, in their examination in chief, that the house in which the plaintiff resided was a private dwelling-house; that it had never been a shop; that it had sash-windows; and that, in fact, it resembled in external appearance the other dwelling-houses in the neighbourhood. In cross-examination, however, they admitted, that, about nine or ten months before the events above stated took place, a few articles, which had formed part of the plaintiff's old stock, had been sold in the house in question; but they further stated, that there had never been any counter, nor any other shop-fittings on the premises. This evidence was in some respects confirmed by witnesses called on behalf of the defendants; but they spoke of sales which had taken place at a much later period than that mentioned by the witnesses for the plaintiff; and they likewise stated, that, on the occasions of some of the sales in question, they had seen an oak chest used by the plaintiff, in order to serve the purposes of a counter.

Such being the facts of the case, it was contended, by

Watson, for the plaintiff, that the defendants had no right *what-ever to enter on the premises of the plaintiff; and that, therefore, although the trespass had been admitted on the record, and a sum of money paid into court in satisfaction of damages, the plaintiff was still entitled to a verdict for further damages, in respect of the wrong complained of. Whatever authority the elder defendant possessed in the matter in question is derived from the statute 5 & 6 Will. 4, c. 63. That act is intitled, "An Act to repeal an act of the fourth and fifth year of his present majesty, relating to weights and measures, and to make other provisions instead thereof;" and by the 17th section thereof, it is enacted, *inter alia*, "that the justices of the peace of every county, riding, or division, or county of a city, or county of a town, in general or quarter sessions assembled, . . . shall determine the number of copies of the imperial standard weights and measures which they shall deem requisite for the comparison of all weights and measures in use within their respective jurisdictions, and shall direct that such copies, verified and stamped at the exchequer, shall be provided for the use of the same, and shall fix the place at which such copies shall be deposited, and shall appoint a sufficient number of inspectors of weights and measures for the safe custody of such copies, and for the discharge of the other duties hereinafter mentioned." It is submitted, however, that, under the provisions of this act, the elder defendant had no authority whatever to do as he had done in the present case. The words of the 28th section of the act in question are as follow:—"Be it enacted, that in England and Ireland it shall be lawful for every justice of the peace of any county, riding, or division, or of any city or town, and in

Scotland for every sheriff, justice, or magistrate of any borough or town, or for any inspector authorized in writing under the hand of any justice of the peace in England and Ireland, or of any sheriff, justice, or magistrate in Scotland, at all reasonable times, to enter any shop, store, warehouse, stall, yard, or place whatsoever, within his jurisdiction, wherein goods shall be exposed or kept for sale, or shall be weighed for conveyance or carriage, and there to examine all weights, &c., and to compare and try the same with the copies of the imperial standard weights and measures required or authorized to be provided under this act; and if, upon such examination, it shall appear that the said weights or measures are light or otherwise unjust, the same shall be liable to be seized and forfeited." And it is submitted, that in order to make a seizure of weights or measures lawful under the above clause, the following things were requisite:—1st, the inspector had no right to enter into any of the places enumerated in the act for the purposes therein mentioned, unless "authorized in writing under the hand of a justice of the peace" so to do. But no such authority had been proved in the present case. And, 2dly, the inspector had no right to enter the house of the plaintiff at all, inasmuch as it was clear, that, at the time of his so entering, it was not a "shop or place wherein goods were exposed or kept for sale" within the meaning of the act. Again, even admitting that the original entry was in itself lawful, there could be no doubt that the taking away of the 60-lb. weight was unlawful, and that the defendants in consequence became trespassers *ab initio*. It is expressly enacted by the statute under which the defendants claimed to derive their authority, that the inspectors, after having entered any of the places therein mentioned, are "there to examine all weights, &c., and to compare and try the same with the copies" provided under the act; and they are authorized to seize them only in case it should appear, "upon such examination," that they are light or otherwise unjust. In the present case, however, it was manifest that this provision of the statute had not been complied with. It was clear that the intention of the act was, that no weight or measure should be seized until it had been first compared with the imperial standard. But here no such comparison had been made; but it appeared in evidence, *333] that the weight in question had been carried off by the defendants before they had ascertained whether it was liable to be seized under the act, or not. He also contended, that the weight in question was not one to which the statute applied at all, inasmuch as it was provided by the 21st section, that "nothing therein contained should extend to require any single weight above fifty-six pounds to be inspected and stamped, such weight of fifty-six pounds being the greatest of the imperial standard weights deposited in the exchequer."

Martin, *contra*, admitted that the taking of the 60-lb. weight from the house of the plaintiff, without having previously compared it with the imperial standard, was an act, on the part of the defendants, not authorized by the statute. He contended, however, that, in other respects, they had conducted themselves according to its provisions. 1st, he argued that proof of a warrant from a justice of the peace in each individual case was not necessary, and that the defendant Johnson was sufficiently authorized to act by virtue of his general appointment as inspector of weights and measures under the act. In support of this opinion, he cited the case of *Hutchings v. Reeves*, 9 M. & W. 747, where it was decided that an inspector of weights and measures, appointed by the sessions under the 5 & 6 Will. 4, c. 63, s. 17, and having a general warrant from a magistrate,

under sect. 28, to act as such within his jurisdiction, might, by virtue of such appointment and warrant, enter any shop, &c., within his district, at all seasonable times, to examine and seize false weights and measures, and need not have a special warrant from a justice in each individual case.

ROLFE, B.—According to that case, it is clear, that a special warrant was not necessary in order to entitle the defendants to enter under the act.

**Martin* then submitted, that, as the 28th section of the act did [*334 not apply solely to places in which goods were exposed for sale, but also to places in which they were kept for sale, it was within the spirit of the act, that the inspector should have the power of visiting all places in which he had reason to suspect that goods were kept and sold privately. In this view of the case, therefore, it was not necessary for the defendants to show, that, at the time they entered on the plaintiff's premises, sales were actually taking place; but it would be a sufficient justification for them, that they believed that such was the case, and that accordingly they entered *bond fide* with an honest intention, and in the exercise of their supposed duty. He also contended, that, under the 21st section of the act, there was nothing illegal in the defendants inspecting the 60-lb. weight.

ROLFE, B., in summing up, observed, that, although, under the 21st section of the act, no single weight above 56-lb. was required to be inspected and stamped, still that there was nothing in that section which prohibited the inspector from entering in order to inspect and stamp in such a case as the present. As to the taking away of the 60-lb. weight, there was no doubt that the defendants were not justified in removing it until they had previously tested it by the imperial standard, which had not been done in this case. As to the construction of the 28th section, his lordship said, the suggestion on the part of the defendants is, that the plaintiff had been carrying on business clandestinely on the premises in question. That this was the case up to a certain period is undisputed; and there is even some evidence to show, that the same practice was continued up to the time at which the trespass was committed. If such had in fact been the case, the defendants would have been justified in entering as they did; and therefore, in assessing the damages, you must take into your consideration, whether, under the circumstances, the *defendants entered the premises of the plaintiff without colour of right; or [*335 whether they entered into a place into which they might well believe, that, under the act, they were entitled to enter, although, from some circumstances in their conduct, they subsequently became trespassers. In my view, the evidence shows that this latter really was the case.

The jury returned a verdict for the plaintiff, damages, £5.

W. H. Watson and *Tomlinson*, for the plaintiff.

Martin, for the defendants.

POTT and Others, Assignees, &c., v. BEVAN.

An agent has no right, without the authority of his principal, to overdraw a banking account. But if it appear that the agent has done so with the knowledge of his principal, the jury will be warranted in inferring from this, that the agent had, in fact, the requisite authority.

If the balance of a banking account remain overdue after the bankruptcy of the banker, his assignees are entitled to recover interest on such balance, as well for the period which has elapsed since the bankruptcy, as for that which had elapsed before it.

ASSUMPSIT for work and commission, for money lent, money paid, money had and received, for interest for the forbearance of money, and on an account stated.—Plea—*non assumpsit*.

The plaintiffs were the assignees of the estate of Douglas, Smawley, & Co., who had carried on business as bankers at Holywell, in Flintshire; and the circumstances out of which their claim against the defendant arose were the following:—It appeared that, in the year 1825, a company, called The British Gas Company, had been established, and that they had erected gas-works at a place called Greenfield, near Holywell. In the year 1829, the company appointed one James Williams, as their agent, to manage the *336] works at Holywell; and in the year 1831, these works were let to one Webber, who continued Williams in his appointment of agent. Webber died in 1834; and from that time until 1836 the gas-works were carried on by Webber's widow, Williams having likewise acted as her agent in the management thereof. In May, 1836, Mrs. Webber died; and from that time until March, 1843,—when the lease of the works expired, and possession thereof was resumed by the British Gas Company,—the defendant Bevan carried on the works at Holywell, as the administrator of Mrs. Webber. The defendant, however, did not superintend the works in person; but he, likewise, appointed James Williams to manage the same for him. So far back as the year 1831, Williams had kept an account at Douglas & Co.'s bank, as agent for the gas-works, and this he continued to do until the death of Mrs. Webber, in 1836. After that event, and after the defendant had obtained letters of administration to Mrs. Webber's estate, an account was opened by the bank through the agency of Williams, "with the administrator of the late Mrs. Webber, deceased;" and this account continued to be kept until the bank stopped payment, in the year 1839. During this period Williams had several other accounts at Douglas & Co.'s; one as actuary of the Holywell Savings-bank, another as secretary to a charitable institution in that town, and a third on his own private account.

It appeared further, that the defendant used to come occasionally to Holywell; that he had likewise frequent communications with Williams respecting the gas-works; and the latter stated, in the course of his examination, that the defendant was well aware, that he (Williams) was in the habit of drawing checks on the bank on account of the gas-works, and of paying money for the concern by means of such checks. Williams further stated that he used to send statements of account to Bevan; and that, upon one occasion, he had told Bevan that there was a balance due to the bank.

*337] In November, 1839, Douglas & Co., stopped payment, but this fact Williams did not communicate to Bevan until March, 1840. In the year 1842, Williams settled and signed a stated account with the bank, as superintendent of the gas-works, and agent of the administrator of Mrs. Webber; but this was done without the privacy of Bevan. The account thus settled showed a balance due to Douglas & Co. of £351, for which they held fourteen checks, as vouchers. Of these checks, ten were drawn in the following form:—

"Messrs. Douglas, Smawley, & Co., Holywell Bank, Pay Messrs. A. & Co. or bearer £——, on ac. administrator of Ann Webber.

"JAMES WILLIAMS, Supt."

and the remaining four were drawn in the same form, except that they were signed, "on ac. Holywell and Greenfield Gas Works—James Williams, Superintendent."

The whole of the above balance had accrued subsequently to the death of Mrs. Webber; and to recover the same the present action was brought.

Upon this state of facts,

Murphy, Serjt., contended, that there was no evidence that Williams had any authority from Bevan to overdraw the account at Douglas & Co.'s bank. He argued, that nothing short of an express authority from the principal, or a subsequent recognition by the latter, was sufficient to justify an agent in borrowing money; as to this, there could be no doubt since the decision of the Court of Exchequer in *Hawtayne v. Bourne*, 7 M. & W. 595, and the present was a similar case. Unless, therefore, the jury were satisfied, either that Bevan had introduced Williams to the bank as a person authorized to overdraw the account, or, knowing that such was the latter's previous course of business, had consented to it, they must find for the defendant.

*ROLFE, B., to the jury.—The point for you is, whether Williams had authority, express or implied, to overdraw the account at [338 Douglas, Smawley, & Co.'s? Overdrawing an account is, in fact, borrowing money; and the law is quite clear, that an agent cannot do this so as to bind his principal, without either an express or implied previous authority, or an authority to be inferred from the subsequent recognition by the principal of the agent's conduct. On this point, the case of *Hawtayne v. Bourne*, referred to by my brother *Murphy*, leaves no doubt. Now here there is no evidence of any previous authority to Williams to overdraw the account at the bank; and you will, therefore, have to consider whether he was keeping such account as Bevan's agent, and whether the latter knew that he was overdrawing it; because, if he knew this, then the inference is very strong, that he actually authorized such a course of business, and he would be liable accordingly.

A claim was then made by the counsel for the plaintiffs, for interest on the balance alleged to be due from the defendants; and the learned judge was requested to direct the jury, that, in the event of their finding a verdict for the plaintiffs, they should assess such interest as part of the damages.

ROLFE, B., however, expressed it to be his opinion, that, as the relation of banker and customer was put an end to by the bankruptcy of the former, the plaintiffs were not entitled to claim any interest for the period which had elapsed since that time.

Tomlinson, for the plaintiffs, urged, that by the usage of trade they were entitled to interest on the balance due so long as the account remained open; and he referred to the case of *De Havilland v. Bowerbank*, 1 Camp. 50.

*ROLFE, B., directed the jury accordingly; giving to the defendant liberty to move to reduce the verdict. [339

Verdict for the plaintiffs.

Baines and *Tomlinson*, for the plaintiffs.

Murphy, Serjt., and *Robinson*, for the defendant.

In Easter Term, *Murphy*, Serjt., applied to the Court of Common Pleas to set aside the verdict, on the ground that the learned judge who tried the cause should have directed a nonsuit, there not having been sufficient evidence of the agency of Williams; but the court refused to disturb the verdict. He also applied for and obtained a rule to show cause why the verdict should not be reduced, by deducting therefrom the amount allowed by

the jury for interest on the balance due to the plaintiffs; and in the next term this question was argued by *Talfourd*, Serjt., for the plaintiffs, and *Murphy*, Serjt., for the defendant. For the plaintiffs it was argued, that, according to the usage of trade, they were entitled to interest on the balance due to the bankers; and that the bankruptcy of the latter did not alter their rights in this respect. Had the contract between the parties been, that, in consideration that the bankers would continue to make advances, then the customer would pay interest on the balance due, the argument on the other side might have been correct. But this was not the contract here; and, therefore, as it could not be said that, had the bankers continued solvent, but refused to make advances, interest would not have been payable on the balance due at the time of such refusal; so neither could it be said that such interest was not payable, merely because the bankers had, by reason of their insolvency, discontinued to make advances to the defendant. The bankruptcy of the bankers had taken away from them the *340] *ability to make further advances; but it had not deprived the defendant of the use of the money already advanced; and as the contract between them was to pay interest on the sums advanced, the plaintiffs were therefore entitled to interest on the sum now shown to be due to them. And he cited the cases of *De Havilland v. Bowerbank*, 1 Camp. 50; *De Bernales v. Fuller*, 2 Camp. 427; *Calton v. Bragg*, 15 East, 223; *Bruce v. Hunter*, 3 Camp. 467; *Moore v. Voughton*, 1 Stark. 487; *Newal v. Jones*, Mood. & Malk. 449.

Murphy, Serjt., contra, contended that, the relation of banker and customer having been determined by the bankruptcy, the principal sum due at that time was all that could be recovered. He cited *Cameron v. Smith*, 2 B. & Ald. 305.

The court, (a) however, were of opinion that the assignees were entitled to recover interest on the balance due from the defendant. It was clear that, if the house of Douglas & Co. had not stopped payment, they would have been entitled to interest on this balance; and as the assignees were placed by the 6 Geo. 4, c. 16, s. 63, in the same situation as the bankrupts as to their rights, they considered that the present plaintiffs were likewise entitled to such interest, and that, therefore, the verdict should stand.

Rule discharged accordingly.

(a) Which consisted of Tindal, L. C. J., and Colman and Cresswell, Js.

*341] HOLGATE and Others v. KAY.

Where premises are demised by indenture at an entire rent, and there is a covenant by the lessor to pay such rent, no action for rent arrear can be brought on such covenant, unless the lessee has been let into full possession of the premises demised.

Where, in such an action, the defendant, in his plea, sets forth the lease, and then avers that "he entered and was possessed" of the premises thereunder, this will not estop him from proving, that, when he so entered, he found some part of the said premises in the possession of a third party under an adverse title.

This was an action on a covenant to pay rent for certain parcels of land and water privileges, demised by a certain indenture of lease to the defendant; and the breach alleged was the non-payment of such rent.

The defendant pleaded two pleas, namely, first, a plea which set out the indenture of lease on which the action was brought, and which concluded by alleging, in substance, as follows:—that part of the demised premises

was, at the time of the granting of the said lease, in the possession of a third person who had lawful title thereto, and that the defendant had been kept out of possession of the said part of the said demised premises by such third person; and secondly, that certain persons had obtained rights of way in and over the premises in question, and that by the exercise of such rights of way the defendant had been and was deprived of the use of the water-privileges demised to him by the said indenture of lease.

On these pleas issue was joined.

The following were the material facts of the case:—On the 1st of May, 1801, a lease was granted by one Lomax to one Hay, for a term of 999 years, of several parcels of land, known as the Mill-card, the Cross-meadow, and the Cross-field, and also of a stream called the Spottin-river. The lease likewise gave liberty to the lessee to cut goits or drains into part of the Cross-field; and there was a covenant by Hay to erect a mill on the premises. On the death of Hay his widow became possessed of the term in question; and on her death it came into the possession of a person named Stock, who was the devisee under her will. Some time afterwards an agreement was entered into between Stock and Kay, the father of the present defendant, whereby Stock agreed to grant an underlease of the premises to Kay, at a certain rent. Such underlease, however, was never executed. Kay died; and on the 10th of June, 1839, *the plain- [*342 tiffs, who had become possessed of the term, granted an underlease to the defendant on the same conditions as those contained in the agreement between Stock and his father. Soon after the lease was granted to Kay, it was discovered that there was a difficulty in the way of obtaining possession of certain parts of the Cross-field and Cross-meadow. They were, in fact, in the possession of parties who claimed under Lomax, the original lessor. It was likewise discovered that certain parties had acquired rights of way over the land in question, so that a reservoir which the lessee wished to make therein, could not be made. The lessors were then applied to by Kay, either to put him in full possession of the premises demised, or to make a rateable reduction in the rent. This application, however, was refused; and now the present action was brought in order to recover the entire rent reserved by the lease of the 10th of June, 1839.

Baines, for the defendant, argued that, under these circumstances, the plaintiffs were not entitled to recover in the present action. The action was not for use and occupation; but it was brought on a covenant in a lease whereby certain premises had been demised to the defendant at an entire rent, and part of which premises the defendant had never enjoyed. The defendant, therefore, had never been let into possession of the thing for which he had bargained; and this, he submitted, was a good bar to any action on the covenant to pay the rent reserved. He cited, in support of his position, the cases of *Gardiner v. Williamson*, 2 B. & Ad. 336; *Neale v. McKenzie*, 1 M. & W. 747; and *Tomlinson v. Day*, 2 Brod. & Bing. 680.

Knowles, contra, submitted that the rent might be apportioned; and that, therefore, the plaintiffs were entitled to recover for such part of the premises as the defendant had enjoyed. He likewise contended, that, as the defendant *had alleged in his plea that "he entered and was possessed [*343 of" the premises in question, he was estopped by such allegation [of] from taking his present objection.

ROLFE, B.—As to the former point, I take it to be perfectly clear, that if you cannot give full possession of the thing demised, you cannot sue in covenant for the rent. As to the other point, I consider that there is nothing

in the defendant's allegation, that he "entered and was possessed," at all inconsistent with the fact, that he may merely have entered for an instant on the demised premises, and found, on his so entering, that another person was in possession under an adverse title. Such an allegation is, in my opinion, no estoppel.

A verdict was ultimately taken for the defendant on the first plea, and for the plaintiffs on the second; leave being given to the plaintiffs to move for judgment *non obstante veredicto*.

Knowles and *Segar*, for the plaintiffs.

Baines and *Tomlinson*, for the defendant.

In pursuance of the liberty granted to the plaintiffs at the trial, a motion for judgment *non obstante veredicto* was afterwards made by *Knowles* in the Court of Common Pleas at Lancaster: and a rule *nisi* obtained, against which *Baines* and *Tomlinson* showed cause in Trinity Term last, before Mr. Justice COLTMAN and Mr. Baron ROLFE, who sat as judges of that court. After argument the rule was discharged, and the ruling of Mr. Baron ROLFE confirmed, on the authority of *Stevenson v. Lambard*, 2 East, *344] 575, in which case the *Court of King's Bench held, that, "in covenant as between lessor and lessee, where the action is personal and upon a mere privity of contract, and on that account transitory as any other personal contract is, the rent is not apportionable." 2 East, 579.(a)

(a) See, also, Bro. Ab. *Contract*, pl. 16; Finch's Law, lib. 2, c. 18; and Moor, 116.

LILLEY and Others (Assignees of BENNETT) v. BARNSELY and Another.

If A. deliver a chattel to B. under a contract by the latter to perform certain work thereon at a fixed price, and, before such work is completed, A. countermand the order, and demand the chattel from B., at the same time tendering a sum sufficient to pay for the work actually done, he will be entitled to maintain trover therefor, without tendering the contract price.

But, in such a case, the jury must estimate the measure and value of the work done, as if the contract had never existed.

Semble, that, by the custom of trade in Manchester as between calico-printers and engravers, the latter have no right of general lien for balances due to them from the former.

THIS was an action of trover.—Pleas: 1st, not guilty; 2dly, not possessed.

It appeared that Barnsley, in company with one Buckley, carried on the business of an engraver in Manchester, and that the latter had taken an order from Bennett, the bankrupt, to engrave for him certain rollers, which were intended to be used in the process of calico-printing. The price which was agreed to be paid for engraving all the rollers was £33. Before the work which was to be done to the rollers had been completed, Bennett called on the defendants, and after making some representations as to his circumstances, requested them to proceed no further with it. To this they consented, and the work was accordingly stopped. Some time after this Bennett became bankrupt, and his assignees applied to the defendants to have the rollers delivered up to them. This, however, the defendants refused to do, unless they were paid the whole sum of £33, originally agreed upon as the price of engraving the rollers in question.

The plaintiffs offered to pay for the work which had been done, and they tendered a *sum of £10 for that purpose. This offer was refused; [*345 and in consequence thereof, the present action was brought.

Walson, for the defendants, submitted that, inasmuch as the contract was to engrave the rollers for a specific sum, the party who had possession of those articles was entitled to a lien thereon for the amount of the contract price; and that, consequently, the bankrupt had no right to countermand the order for the work, or to get possession of the rollers until that price was paid or tendered.

Martin, *contra*.—The owner of a chattel, who orders work to be done thereon, has a right to countermand that order. The real situation of the bailor and bailee in such a case is this. The bailee agrees to perform certain work for the bailor, on chattels which the latter has delivered into his possession for that purpose; and for whatever amount of work the bailee has actually done on those chattels, he is entitled to be paid; or, if the price of such work be not paid, he has a lien on the chattels themselves. If, however, the owner of the chattels, before the work has been done, countermands his order, this will not have the effect of giving the bailee a lien for the whole of the contract price. The right of the owner to have the chattels is undisturbed: and therefore, if he pay or tender the price of the work actually done, he is entitled to have them given up to him; although, by his having countermanded the order for the work to be done, he may render himself liable to an action for the breach of his contract.

ROLFE, B.—In my opinion, the law on this question stands thus. If one man enters into a contract with another to get certain work done, and the latter agrees to do that work for a specific sum, but the party to whom belongs the chattel on which the work is to be done prevents him from completing such work, the party so prevented has a right of action to recover any damage which *he may have sustained by reason of [*346 such prevention; and he has also a right of lien for the value of the work actually done, as well as for any expense incurred by him in doing the same. Although, therefore, the circumstances of this case might form a good ground for an action, by the present defendants, to recover damages for having been prevented from completing the work which they had agreed to do on the rollers, still I do not think that, in order to entitle the assignees to get possession of those rollers, there was any necessity for them to tender the contract-price of £33.

Walson then stated, that he was instructed that, by the custom of trade in Manchester between calico-printers and engravers, the latter were entitled to a general lien on all goods of the former which happened to be in their possession; and he further stated, that he would be able to show that the bankrupt owed money to the defendants for other work which they had done for him. He then called two witnesses to prove the custom, and their evidence was as follows:—

The first witness stated that he was an engraver in Manchester, and that, upon one occasion, an order had been given him to engrave twelve rollers, which were sent to him for that purpose. All the rollers were delivered to him under one order. The person to whom the rollers belonged subsequently became bankrupt, and the witness claimed to hold them by virtue of his lien. He had never exercised the right on any other occasion; and he stated that the right which he had so exercised was what he understood to be that of a general lien. The other witness (who was likewise an engraver in Manchester) stated, that there was a cus-

tom in their trade to hold both for particular and general balances, and that they had also a right to sell the thing retained, in order to repay themselves. He gave three instances in which he himself had exercised this right ; but it appeared, on his being cross-examined, that he had been in the habit of *347] using "bill-heads," in *which it was stated, that all goods delivered to him to be engraved would be subject to his right of general lien.

Evidence was also given in order to prove the insufficiency of the sum which had been tendered by the plaintiffs ; and a witness was called who stated that the value of the work actually done to the rollers was 14*l.* 10*s.*

Martin, in reply, contended, first, that the defendants had not proved their right, by the custom of the trade, to retain the goods in question by virtue of a general lien ; and, as to the sufficiency of the tender, he argued, that the valuation of the defendants was made on a wrong estimate, inasmuch as the proportion of work done should have been valued according to the terms of the original contract ; and that, proceeding on this principle, it would be found that the sum of £10, which had been tendered, was sufficient to compensate for what had been done to the rollers.

ROLFE, B., to the jury.—The defendants say, that they had a right to retain these goods, not only for the value of the work done on them, but likewise for their general balance. Now, particular liens are well established ; but, with the exception of bankers and factors, I am not aware of any instances in which, in the absence of an express or implied agreement to that effect, the law allows a general lien. Here, however, the evidence is so excessively loose, that we cannot conclude from it that any such agreement existed between Bennett and the defendants. The evidence of the first witness, who was called to prove the custom, amounts, when explained by himself, to nothing like evidence of a general lien ; and from the evidence of the second witness it is clear, that he claimed the right of general lien, not by virtue of any custom of trade, but by reason of a special contract which was entered into by him in each individual case. As to the sufficiency of the tender, I am of opinion that the *348] original contract, having *been repudiated by the bankrupts, is now at an end for all purposes : and that you must, therefore, judge of the measure and value of the work done, as if there had been no contract at all.

Verdict for the defendants.

Martin and Greene, for the plaintiffs.

W. H. Watson, for the defendants.

WHITE v. SHARP.

Where three arbitrators were appointed, with power to any two of them to make their award, and the award was afterwards made as the award of the three, but it was executed by two only :—*Held*, that the power was well executed.

This was an action of debt on an award, and the facts of the case were as follow :—

The plaintiff had been the master of a ship of which the defendant was the owner. The ship, on her homeward voyage, had touched at St. Helena ; and, at the time of her arrival there, there happened to be on the island one M., who, with his wife, children, and servants, had, some time previously, been shipwrecked, and had lost their all. It further

appeared that the governor of the island had directed the plaintiff to take M. and his family on board, in order to convey them to England; that the plaintiff had accordingly done so; and that the Admiralty had paid him, by way of passage-money for M. and his family, the allowance usually made in such cases, namely, one shilling and sixpence per day per head. When the plaintiff arrived in England, and came to settle with the defendant, the latter demanded to deduct from the moneys which were coming to the plaintiff, the sum of £220, as for the passage-money in question. To this, however, the plaintiff objected, offering, at the same time, to deduct the sum received by him from the Admiralty, but refusing to make any further deduction. Under these circumstances, the plaintiff and *defendant agreed to refer the matter to arbitration; and a submission was accordingly proposed, whereby three arbitrators were appointed, *with power to any two of them* to make their award in writing with reference to the matters in dispute between the parties. Under this submission the arbitrators met; and, ultimately, two of them agreed to make their award in favour of the plaintiff, whilst the third was of opinion that the defendant's claim should be allowed. The award was accordingly drawn up for the plaintiff, and it was so drawn up as being the award of all the three. In fact, however, it was executed by two of the arbitrators only.

Cowling, for the defendant, objected that the action could not be maintained, inasmuch as the award was void. He contended that the award was not a good execution of the power. This had been decided in the case of *Thomas v. Harrop*, 1 Sim. & Stu. 524. In that case it had been provided, by an agreement of reference, that the award should be made by four persons, or any three of them. An award was prepared, purporting to be the award of the four referees, but it was executed by three of them only; and the Vice-Chancellor (Sir J. LEACH) held, that this was no good award; that it was not the award of the four referees, because it was signed by three of them only; and that it was not a good award of those three, because it professed to be the award of all the four. So in the present case; had the award on the face of it appeared to have been the award of the two only by whom it had been executed, it would have been a good award; but professing, as it did, to be the award of three, whilst at the same time it had been executed by two only, it was void.

ROLFE, B., directed the jury to find a verdict for the *plaintiff, at the same time giving the defendant leave to move to enter a [*350 nonsuit.

W. H. Watson and *Crompton*, for the plaintiff.

Cowling, for the defendant.

Cowling, in the next term, moved accordingly; but the Court of Exchequer refused a rule.

FLETCHER and Another (Assignees of CHAPPE) v. MANNING and Another.

Where a petitioning-creditor's debt consists of a certain principal sum and interest, but, by reason of its insufficiency, another debt is substituted for it under the 6 Geo 4, c. 16, s. 18, it is sufficient to constitute such second debt a debt "not anterior" to the

former, that the principal sum was due before the accruing of the substituted debt, although the interest thereon may have been accruing up to a period subsequent thereto.

The proof of a petitioning-creditor's debt may be received in evidence, without its having been enrolled, provided the handwriting of the petitioning-creditor be proved, and the deposition be produced from the original proceedings under the fiat.

Where a mill, and the machinery therein, had been mortgaged, and the mortgagor continued in possession until the time of his bankruptcy:—*Held*, that the machinery was not in the order and disposition of the bankrupt, within the meaning of the bankrupt acts.

Semle, that where a creditor proves under a fiat in bankruptcy, for a debt due on bills of exchange of which the bankrupt is the drawer, it is not necessary for him to aver in his deposition that the bills were duly presented, and that notice of their dishonour was given to the bankrupt.

ASSUMPSIT for money had and received, and on an account stated.

Pleas. 1st, *non assumpsit*; 2d, that the plaintiffs were not the assignees of the estate and effects of the said Chappè, in manner and form as in the declaration alleged. Issue thereon.

The facts of the case were as follow:—The bankrupt Chappè had been a manufacturer in Manchester, and had employed one Buxton as his agent in London. Buxton had, at the request of Chappè, become guarantee for him to the amount of upwards of £4669; and in order to secure this sum *351] the latter had, on the 27th September, 1839, *given him a warrant-of-attorney directed to the defendants, whereby they were authorized to enter up judgment and sue out execution for the sum of £11,000. Default having been made by Chappè, execution was afterwards issued accordingly; and on the 10th of February, 1840, the sheriff entered thereunder and seized the whole of his property. Before the sale, however, to wit, on the 11th of February, 1840, Chappè executed an assignment for the benefit of his creditors; and on the 12th of that month a fiat in bankruptcy issued against him,—the execution of such assignment being the act of bankruptcy on which the said fiat was founded. Notice of Chappè's bankruptcy was forthwith given to the sheriff, but the defendants (to whom it appeared that Buxton had, on the 16th of January, 1840, assigned the securities held by him of Chappè, and who were, in fact, the parties really interested under the warrant-of-attorney) insisted on his proceeding to a sale, and at the same time agreed to give him an indemnity. Chappè's property, which consisted partly of household furniture and goods in the process of manufacture, and partly of machinery, was accordingly sold under the execution, and the proceeds of the sale, which amounted, after payment of expenses, to £2156, were remitted to the defendants. The present action was brought by the assignees of Chappè, to recover this sum as money had and received to their use.

In order to show, under the issue raised by the second plea, that the plaintiffs were the assignees of the estate and effects of Chappè, proof was given of the trading and act of bankruptcy; and the following evidence was then given in order to prove the petitioning-creditor's debt:—it appeared that the fiat against Chappè had been originally sued out on the petition of one John Fletcher. The debt due from the bankrupt to him had accrued due on the 31st of December, 1829, and it amounted at that time to the sum of 220*l.* 8*s.* 11*d.* Before the 31st of December, 1835, however, this debt had been reduced to the sum of 95*l.* 16*s.*; and from that time until the 31st December, 1839, when the account was closed, *352] interest had been charged annually *on this balance; so that, at that time, the sum alleged to be due to Fletcher was 105*l.* 7*s.* O-

petitioning for the fiat against Chappè, this last sum was sworn to by Fletcher, as for the petitioning-creditor's debt. It appeared, however, that, in the course of the proceedings, some doubt arose as to the right of Fletcher to charge interest on the balance of 95*l.* 16*s.*, in the manner above stated; and the consequence was, that the Lord Chancellor was applied to, under the 6 Geo. 4, c. 16, s. 18, and an order obtained from him, to substitute the debt of Messrs. Jones, Lloyd & Co., bankers, for that of Fletcher, as the petitioning-creditor's debt on which the fiat should be proceeded in. At the time of the bankruptcy of Chappè, a considerable balance was due from him to Jones, Lloyd & Co.; and it appeared, that, as security for that balance, they held two bills of exchange; one of which was drawn by Chappè on Buxton, and the other on a person named Hudson; and also three promissory notes, which were drawn on the 25th September, 1838, by Chappè, in favour of Jones, Lloyd & Co., payable respectively, at 18, 24, and 30 months after date. With reference to the bills of exchange drawn on Buxton and Hudson, the deposition of Jones, Lloyd & Co., did not contain any averment, that those bills had been presented for payment, or that notice of their dishonour had been given to Chappè.

The first objection taken on the part of the defendants was to the admissibility of the proof of John Fletcher's debt. A witness was called, who produced the proceedings under the fiat against Chappè; and it was then proposed to read Fletcher's deposition.

Hoggins objected to this, on the ground that the deposition could not be admitted, unless it had been previously enrolled: and he referred to the statute 2 & 3 Will. 4, c. 114, s. 9.(a)

**Knowles*, contra, argued, that it would be sufficient for him to prove the handwriting of John Fletcher to the deposition, as petitioning-creditor; and to show that the witness produced such deposition from the original proceedings under the fiat. [*353]

On this evidence being given,

ROLFE, B., admitted the document.

Hoggins and *Robinson* then contended, that the plaintiffs must be nonsuited, inasmuch as they had failed to prove a good petitioning-creditor's debt. With reference to the bills of exchange drawn by Chappè on Buxton and Hudson, they submitted, that, inasmuch as Chappè would not have been liable on those bills until after presentment and due notice of dishonour, so it was incumbent on Jones, Lloyd & Co., to have averred in their deposition, that such presentment had been made and such notice of dishonour given; and they contended, that, by reason of the absence of such averment, the proof of Jones, Lloyd & Co., as to those bills, was not, *per se*, a sufficient proof of any debt on the face of it. Then, as to the promissory notes, they contended, that the proof was equally unavailable, because it did not come within the terms of the 6 Geo. 4, c. 16, s. 18. The words of that section were, that, in the event of the petitioning-creditor's debt being "found insufficient to support a commission, it shall be lawful for the Lord Chancellor, upon the application of any other creditor

(a) Which enacts:—"That upon the production in evidence of any commission, fiat, adjudication, assignment, appointment of assignees, certificate, deposition, or other proceeding in bankruptcy, purporting to be sealed with the seal of the said Court of Bankruptcy, or of any writing purporting to be a copy of any such document, and purporting to be sealed as aforesaid, the same shall be received as evidence of such documents respectively, and of the same having been so entered of record as aforesaid without any further proof thereof."

or creditors, having proved any debt or debts sufficient to support a commission, *provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning-creditor or creditors*, to order the said commission to be proceeded in; and it shall, by such order, be deemed *354] valid." Was, then, "the debt of Jones, Lloyd & Co., in respect of these promissory notes, a debt "not anterior" to the debt of John Fletcher, the petitioning-creditor? They submitted that it was not. The last balance of account between John Fletcher and Chappè was on the 31st December, 1839; and as the other side did not rely on the balance of 95*l.* 16*s.*, which was shown to have been due before that time, but on that balance together with interest up to the time the account was closed, namely on the 31st December, 1839, that was the date at which the debt of John Fletcher as petitioning-creditor must be taken to have come into existence. But the promissory notes on which Jones, Lloyd & Co., proved were dated on the 25th September, 1838; and as those notes formed a good subject for a petitioning-creditor's debt from that date, it was clear that the plaintiffs had not shown a debt existing in respect of those notes which was "not anterior" to the debt of John Fletcher.

Knowles and Crompton, contra, contended that the proof of Jones, Lloyd & Co. was sufficient; and that, even if it were not so, the fiat could still be supported, because, by the showing of the other side, more than £100 had been due to John Fletcher at the time of Chappè's bankruptcy.

ROLFE, B.—In my opinion the plaintiffs have proved all that they were bound to prove. The petitioning-creditor's debt in this case consisted of the principal sum of 95*l.* 16*s.*, together with a sum for interest, which brought the debt up to something above £100. On investigation, however, a portion of this sum turned out not to be a good subject for a petitioning-creditor's debt; in other words, the real debt due to John Fletcher must be taken to have been the principal sum of 95*l.* 16*s.* only. But this sum was due so far back as the year 1829, long anterior to the debt on which Jones, Lloyd & Co. have proved. It is not because the petitioning-creditor endeavours to tack on interest to this sum, that therefore the *355] debt itself ceases to be "anterior. Indeed, if that were so, the 18th section of the 6 Geo. 4, c. 16, would be nugatory; for in every case in which the creditor holds a bill of exchange for his debt, or has given notice in writing claiming interest to be paid thereon, such interest must accrue *de die in diem* up to the time of issuing the fiat: and therefore, to talk of a debt which is not to be anterior to the petitioning-creditor's debt, would in such cases be to talk about that which could never exist. It appears to me, then, that the petitioning-creditor's debt in this case was ascertained to be the principal sum of 95*l.* 16*s.*; and this debt, it is clear, existed in 1829; so that the debt of Jones, Lloyd & Co., which has been substituted for it, is a debt "not anterior" thereto within the meaning of the statute. As to the other point, namely, the suggestion that Jones, Lloyd & Co. ought to have shown, on the face of their proof, a due presentment and notice of dishonour of the bills of exchange, I think there is nothing in that. In my opinion, therefore, neither of the grounds taken by the defendants is maintainable. I will reserve to them, however, liberty to move to enter a nonsuit.

It appeared further, that, on the 27th September, 1839, Chappè had assigned to one A. F. all his interest in the manufactory at Manchester, including the machinery contained therein, subject to a previous mortgage thereof to Lord Balcarras; and it had been argued by

Knowles, that the jury, in the event of their finding for the plaintiffs, must assess the value of such machinery as part of the damages, because, at the time of the bankruptcy, it had been in the order and disposition of the bankrupt.(a)

ROLFE, B., however, in summing up, told the jury, that, if the machinery which was seized in February was the *same as that which had been assigned in September, the bankrupts had no title to it; and [*356 that, therefore, the only question for them was,—was it, in fact, the same machinery, or not?(b)

Verdict for the plaintiffs, damages £963, with leave to move to enter a nonsuit, or to increase the damages.

Knowles and *Crompton*, for the plaintiffs.

Hoggins and *Robinson*, for the defendants.

In the next term, (19th of April, 1844,) *Hoggins* moved accordingly: first, to enter a nonsuit, on the ground that the debt of John Fletcher was a debt “not anterior” to that of Jones, Lloyd & Co., within the meaning of the 6 Geo. 4, c. 16, s. 18; and, secondly, to increase the damages. The court, (c) however, refused the rule for a nonsuit: and, with respect to the question of damages, the cause was ultimately agreed to be referred to the master.

(a) See 6 Geo. 4, c. 16, s. 73.

(b) See as to this point the cases of *Ex parte Reynal*, 2 Mon., Dea., & D. 443; *Ex parte Wilson*, 2 Mon. & Ayr. 61; *Ex parte Lloyd*, 1 Mon. & Ayr. 494; *Hubbard v. Bagshaw*, 4 Sim. 326.

(c) Of Exchequer.

ATKIN and Others v. SLATER and Others.

A written notice of demand, to deliver up certain deeds, was served on three defendants at different times and places:—*Held*, that it was for the jury to say, from the whole of the evidence, whether the defendants had not previously agreed to act in such a manner, with reference to the deeds in question, as to render their refusal, although separately given, evidence of a joint conversion.

On one of the defendants being served with notice of demand, he merely said, “that he would consult his attorney:”—*Held*, that this expression, coupled with his subsequent conduct in not giving up the deeds, amounted to evidence of a conversion.

TROVER for deeds.—Plea, not guilty.

This action was brought by the plaintiffs, who were the assignees of a bankrupt, against the defendant Slater and *two others, who claimed [*357 a right to retain the deeds in question, by virtue of a mortgage from the bankrupt; and the declaration charged the three defendants with a joint conversion. In order to prove such a conversion, the plaintiffs gave evidence to show, that a written notice of demand had been served by one P. on the three defendants respectively. It appeared, however, that the said notice had not been served on the defendants at the same time; but that, on the contrary, such service had been effected at different times and in different places.

Knowles, for the defendants, submitted that this was no evidence of a joint conversion; and that, therefore, the plaintiffs must elect against which defendant to proceed.

ROLFE, B., however, thought that it was for the jury to say, whether it was not apparent, from the whole of the evidence, that the three defend-

ants had, previously to the service of the notice, come to an agreement to act in such a manner, with reference to the deeds in question, as to render their refusal, although separately given, sufficient evidence of a joint conversion.

The evidence against the defendant Slater was, that, when the demand was made, he said "that he would consult his attorney;" and

Knowles contended that this was not such a refusal as to amount to evidence of a conversion on his part: but

ROLFE, B., was of opinion, that the expression used by Slater on his being served with the notice of demand, namely, "that he would consult his attorney," must be coupled with his subsequent conduct in not giving up the deeds; and that the two taken together did amount to evidence of a conversion by him.

*358] The principal question in the cause, however, turned on the validity of the mortgage; and on that point there was a

Verdict for the defendants.

Baines and Robinson, for the plaintiffs.

Knowles and Crompton, for the defendants.

ALDERSON v. T. WAISTELL and H. WAISTELL.

An assault made by a man in defence of his property is justifiable.

Where A. threw a stick, which struck the plaintiff, but it did not appear for what purpose the stick was thrown—*Held*, that it was fair to conclude that the stick was thrown for a proper purpose, and that the striking of the plaintiff was an accident.

TRESPASS for an assault.—Pleas, 1st, by the defendant T. W., not guilty; 2d, that the plaintiff first assaulted him the said T. W., and that he made the assault complained of in self-defence; 3d, that the defendant T. W. was possessed of certain sheep, which the plaintiff with a strong hand attempted to take and seize, and did take and seize, and convert to his own use, without the leave and license and against the will of the said defendant, and that the defendant assaulted the plaintiff in endeavouring to protect the said sheep; 4th, by the defendant H. W., not guilty.

The circumstances which gave rise to the alleged assault were the following:—The plaintiff and the defendant T. W. were both in the habit of pasturing their sheep on a certain common; and, for the convenience of foddering such sheep, they had each erected "bields" on the common, towards which "bields" they were driving their sheep at the time the assault complained of was made. The plaintiff had two "bields," of one of which the defendant T. W., for some cause which did not appear, was desirous to get possession: and it appeared, that, in order that he might do
*359] so, he drove his sheep amongst those of the plaintiff. The latter endeavoured to separate his sheep from those of T. W.; and it was proved, that, whilst he was thus engaged, T. W. assaulted him. The evidence against the defendant H. W., who was the son of T. W., was, that, whilst the sheep were intermingled, he threw a stick which struck the plaintiff. But it did not appear that he threw the stick with the intention of striking the plaintiff.

ROLFE, B., in summing up, observed:—If you are satisfied that the defendant T. W. has made out either of his pleas, he will be entitled to your verdict; because, if the blow complained of was really and *bona fide* struck in order to prevent the plaintiff from getting away the defendant's sheep,

that is a sufficient justification. With reference to the younger defendant, H. W., the only evidence is, that he threw a stick, which stick struck the plaintiff. But this is not sufficient, of itself, to constitute an assault; inasmuch as it does not appear for what purpose the stick was so thrown, and it is therefore fair to conclude, that it was in fact thrown for a proper purpose, and that the striking of the plaintiff was merely an accident.(a)

The jury found for the plaintiff on the first, second, and third pleas; and for the defendant H. W. on the fourth.

Knowles and Cowling, for the plaintiff.

Dundas and Bliss, for the defendants.

(a) It is the *quo animo* which constitutes an assault. See per *Legge, B., Griffin v. Parsons*, 1 Sel. N. P. 28, (in notis;) and Bul. N. P. 15.

***OLIVERSON and Another v. BRIGHTMAN and Others. [*360**

A policy of insurance was effected on goods at and from L. to various places in China, amongst others, to Canton, with leave for the ship named in the policy, or any other ship on board which the interest might be transhipped, to touch at various ports, amongst others, Hong-Kong, "or remain at the same until it is deemed expedient to proceed to the port or place of discharge," and the risk was to continue "until the goods are arrived at their final port of destination." When the ship arrived at Macao hostilities were going on at Canton, so that she could not go thither. In the course of the voyage the goods had received some damage; and the consignees, in consequence, ordered the ship to be taken to Hong-Kong, at which place the goods were to be transhipped on board the J. L., in order, as they alleged, to have them examined. Whilst the transhipment was proceeding, the J. L. was driven ashore by a storm, and the goods lost:—*Held*, in an action on the policy, that the mere fact of the vessel named in the policy having been unable to proceed to Canton on account of the hostilities did not, under this policy, make Hong-Kong the final port of destination, so as to determine the risk; but that it was for the jury to say, whether the consignees, when they transhipped the goods, intended to make it so.

THIS was an action of *assumpsit* on a policy of insurance on goods valued at £5000, and the declaration averred a total loss. There were also the common counts. The pleas were, 1st, a denial of the loss; 2d, that, before the loss happened, the goods in question were finally discharged at their port of destination; 3d, that the said goods had been transhipped by the plaintiffs on board a vessel called the *James Lang*, which vessel was unseaworthy, and that thereby they were lost; and, 4th, *non assumpsit*. Issues were joined on these pleas respectively.

It appeared that the goods, in respect of the loss of which the plaintiffs claimed, had been shipped, in the month of October, 1840, on board a ship called the *Penang*, which was then loading at Liverpool for China. The policy of insurance on which the action was brought was effected in the following terms; namely, "at and from Liverpool to Lintin, and for Hong-Kong, and for Tongkoo, and for Macao, and for Whampoa, and for Canton, or all or any other port or ports, place or places in China, the East Indies, or the Indian and China seas, the Gulf of Siam, or seas adjacent; and particularly Manilla and Sincapore, backwards and forwards twice, or oftener, in any rotation; with leave to tranship or reship the interest insured by this policy on board the same or any other vessel or vessels, at or off Sincapore, Manilla, Macao, Lintin, Whampoa, or elsewhere in the Canton river, or on the coast of China, or in the China seas or the Gulf of Siam, or seas adjacent, all or any; and for Canton, Manilla, *Sincapore, [*361 or any other of the ports or places aforesaid; and with leave for the ship named in this policy, or any other vessel or vessels on board which

the interest may have been transhipped, as above mentioned, to proceed from any port or ports, place or places in China, the China seas, or seas adjacent, (particularly the before-mentioned places,) to any other ports or places in China, the East Indies, or the Indian and China seas, or seas adjacent, and discharge the goods at all or any of the said places, or *remain at the same until it is deemed expedient to proceed to the port or place of discharge*; and with leave to call, touch, stay, and trade, discharge, take in, and exchange goods, freights, specie, and passengers at all and any ports and places (customary or not customary) on this side, at and beyond the Cape of Good Hope; and *continuing the risk by land and or by water until the goods are arrived at their final port of destination*, and including all risk of boats and craft, and of transhipment from vessel to vessel, as above mentioned."

The Penang set sail for China on the 1st of November, 1840; but, at that time, her port of destination was uncertain, because this country and China were then at war. Every thing went on well until she arrived off the Cape of Good Hope; but at this period of her voyage she was much damaged by a storm, and the water having got into the hold, her cargo was considerably injured. On the 13th of April she arrived at Singapore; and the captain, being desirous to complete his voyage as quickly as possible, had the ship immediately put under repair. This occupied until the 8th of June, and on that day the Penang sailed for Macao. Whilst the ship was lying at Singapore, the captain did not examine the cargo, because he could not have done so without breaking bulk, which he wished to avoid doing; but he communicated with the consignees of the cargo in China, and informed them of the facts mentioned above. On the 22d of *362] June, the Penang reached Macao. Her cargo, however, "could not be landed there, on account of the hostilities which then existed between the English and the Chinese; and accordingly she was despatched to Hong-Kong, in order, as the plaintiffs alleged, that the cargo might be examined. This was done by the order of Burn, one of the consignees, who was at Macao at the time. Before the Penang sailed for Hong-Kong, the consignees chartered a ship called the James Lang, which they intended to despatch with her; and they stated their object in doing so to have been as follows. At the time above specified there were no warehouses at Hong-Kong; and the consignees intended, that, when the ships arrived at that place, the cargo of the Penang should be transhipped into the James Lang; first, in order that it might be thoroughly examined, for the purpose of discovering the extent of damage it had sustained in the course of the voyage; and, secondly, in order that it might be in a place of safety until a warehouse, either temporary or otherwise, could be provided for it at Hong-Kong, or until the goods could be sent on to Canton, or some other market which might be opened in China. They further stated, that, from the position of affairs at the time, it was impossible for them to make any arrangement as to the final place of destination for the cargo; that the James Lang was not what is commonly called "a receiving ship;" and that Hong-Kong was never intended by them as the final place of deposit for the goods, for the purpose of sale. In pursuance of the above arrangement, the two vessels sailed for Hong-Kong; and, on their arrival at that port, they were anchored alongside one another, and the transhipment of the cargo was forthwith commenced. By the 21st of July, the whole of the cargo, except about 200 bales, had been transhipped; but on that day a typhoon came on, which made it necessary to

anchor the *James Lang* at some distance off, in order that she might ride clear of the Penang; and, not long afterwards, the storm increased to such a height that the former vessel broke from her moorings, and was driven *on shore. This occasioned the loss which was the subject [*363 of the present action.

Knowles, for the plaintiffs, contended, that under these circumstances, there must be a verdict in their favour. The goods were under the protection of the policy until they "arrived at their final port of destination;" and it was for the jury to say whether the consignees intended that Hong-Kong should be their final port of destination, or not. This, however, he submitted, was not their intention. The motive for sending the goods to Hong-Kong, and transhipping them there, was simply that they might be properly examined, which could not have been done without their being so transhipped. At the time they were lost, therefore, they were under the protection of the policy; and the plaintiffs were accordingly entitled to be indemnified, under that policy, for the loss they had sustained.

Kelly, contra, submitted that there was no question in the case which could properly be left to a jury; but that the point in dispute was one entirely of law. The case of *Brown v. Vigne*, 12 East, 283, was exactly in point. There a ship was insured from London to any port or ports on the river Plate until her arrival in her last port of discharge in that river; and the master, intending to discharge her cargo at Buenos Ayres, passed Maldonado; but, hearing that the former port was in the hands of the enemy, he went to Monte Video, with intent to make a complete discharge there if the market were favourable; but, after discharging a part, and not finding the market there so favourable as he expected, he had not abandoned his original intention of going to Buenos Ayres, if it should afterwards be practicable. While he was still discharging part of his cargo at Monte Video, however, a loss happened by a peril of the sea: and it was held, that, as Buenos Ayres, to which other *port only in the Plate [*364 he had contemplated to go, was, at the time of his arrival in that river, and up to the time of the loss, in the hands of the enemy, so that he could not legally go there, Monte Video must be taken to be the ship's last port of discharge, and that, on her arrival there, the policy was discharged. Now, in the present case, the intended port of discharge was Canton, as in the case cited it was Buenos Ayres; and here likewise there were hostilities existing, so that the captain could not proceed to that port, although he might have intended to do so afterwards. The defendants, indeed, admitted that the captain, when he put the goods on board the *James Lang*, did intend, should circumstances permit, to go on to Canton; but still they contended, that when a vessel, under such circumstances as existed in this case, arrives at a place mentioned in the policy, and then lands her cargo, or part of it, into a place of safety, that place is made the ultimate port of discharge, notwithstanding any intention which may exist of afterwards forwarding the cargo. In the case just cited, Lord ELLENBOROUGH says, "Does not the *last port of discharge* mean the last practicable port? The master could not have gone into Buenos Ayres, which was then an enemy's port; and was he at liberty to protract the voyage for that purpose till peace was restored?" (12 East, 285,) and the same remark applies to the present case. In order to obviate this conclusion, the other side will rely on the words in the policy, whereby leave is reserved for the ship therein named, or any other vessel on board which the interest may have been transhipped, to proceed from any port in China,

&c., to any other port in China, &c., "or remain at the same until it is deemed expedient to proceed to the port or place of discharge." They insist that these words were introduced for the purpose of enabling the captain to remain at any of the ports named in the policy until hostilities should cease. If that be the true construction, the plaintiffs must recover; *365] *but it is submitted that the policy has no such meaning. The true meaning is, that the captain was to be at liberty to touch at the ports or places named, but still with a definite view of prosecuting the voyage, and not that he might remain at any one of those ports for any indefinite period during which the war might last. Here, however, there was no such definite view of prosecuting the voyage; and it is therefore submitted, that, so far as the goods lost were concerned, the voyage insured was at an end before that loss occurred.

ROLFE, B., however, was of opinion that the question was,—with what intention was the transshipment made at Hong-Kong? and he accordingly directed the jury to find a

Verdict for the plaintiffs, subject to the opinion of the court above on a special case.(a)

Knowles, Wortley, Martin, and Towlinson, for the plaintiffs.
Kelly, W. H. Watson, and Crompton, for the defendants.

(a) This case had not been argued when these reports went to press.

*366] *HOME SPRING CIRCUIT, 1844.

KENT ASSIZES.

(*Crown Side.*)

BEFORE BARON ALDERSON.

REGINA v. CHRISTOPHER BARTHOLOMEW.

An indictment for perjury stated, that H. L. stood charged by F. W., before T. S., clerk, a justice of the peace, with having committed a trespass, by entering and being in the daytime on certain land in pursuit of game, on the 12th of August, 1843; and that T. S. proceeded to the hearing of the charge, and that, upon the hearing of the charge, the defendant C. B. falsely swore that he did not see H. L. during the whole of the said 12th of August, meaning that he, the said C. B., did not see the said H. L. at all on the said 12th day of August in the year aforesaid; and that, at the time he, the said C. B., swore as aforesaid, it was material and necessary for the said T. S. so being such justice as aforesaid, to inquire of and be informed by the said C. B., whether he, the said C. B., did see the said H. L. at all during the said 12th day of August, in the year aforesaid:—*Held*, that this averment of materiality was insufficient, because, consistently with this averment, it might have been material for T. S. in some other matter, and not in the matter stated to have been in issue before him, to have put this question, and received this answer.

PERJURY.—The indictment was in the following form: "Kent, to wit.—The jurors for our lady the queen, on their oath present, that, on the 28th day of August, 1843, at the parish of Bromley, in the county of Kent, one Henry Liversuch stood charged by one Francis Williams, before Thomas

Scott, clerk, one of her majesty's justices of the peace in and for the said county, assigned to keep the peace, &c., with having, on the 12th day of August, in the year aforesaid, committed a certain trespass, by entering and being in the daytime of the same last-mentioned day upon a certain close of land in the possession and occupation of one William Perschour, there in pursuit of game, contrary to the statute in such case made and provided. And that the said T. S., so being such justice as aforesaid, then and there proceeded to the hearing of the charge so made against the said Henry Liversuch. And the jurors, &c., further present, that, upon the said hearing of the said *charge, Christopher Bartholomew, late of [*367 the parish aforesaid, in the county aforesaid, labourer, then and there appeared as a witness for and on the behalf of the said H. L., and was then and there duly sworn and did take his corporal oath upon the holy Gospel of God, to speak the truth touching the said charge, made as aforesaid before the said T. S., so being such justice as aforesaid, (he the said T. S., then and there having full and competent power and authority to administer the said oath to the said C. B. in that behalf.) And the jurors, &c., further present, that the said C. B., being so sworn as aforesaid, and not having the fear of God, &c., and wickedly devising and intending to prevent the due course of law and justice, then and there, to wit, upon the hearing of the said charge, at the parish aforesaid, in the county aforesaid, upon his oath aforesaid, before the said T. S., so being such justice as aforesaid, (he, the said T. S. then and there having full and competent power and authority to administer the said oath to the said C. B. in that behalf,) unlawfully, falsely, knowingly, wilfully, wickedly, and corruptly did say, depose, swear, and give in evidence, amongst other things, in substance and to the effect following, that is to say, That he the said C. B. did not see the said H. L. during the whole day of the 12th day of August, in the year 1843, (meaning that he the said C. B. did not see the said H. L. at all on the said 12th day of August, in the year aforesaid.) And the jurors, &c., further present, that, at the time he the said C. B. swore as aforesaid, it was material and necessary for the said T. S., so being such justice as aforesaid, to inquire of and be informed by the said C. B. whether he the said C. B. did see the said H. L. at all during the said 12th day of August, in the year aforesaid. Whereas, in truth and in fact, the said C. B. did see the said H. L. on the 12th day of August, in the year 1843, as he the said C. B., at the time he so wilfully and corruptly swore as aforesaid, then and there well knew. And so the jurors aforesaid, upon their *oath. [*368 aforesaid, do say, that the said C. B., on the said 28th day of August, in the year aforesaid, in the county aforesaid, upon the hearing of the said charge, upon his oath aforesaid, before the said T. S., so being such justice as aforesaid, (he the said T. S. then and there having competent power and authority to administer the said oath to the said C. B. in that behalf,) unlawfully, falsely, knowingly, wilfully, wickedly, and corruptly, in manner and form aforesaid, did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our said lady the queen and her laws, to the evil example of all other persons, against the form of the statute in such case made and provided, and against the peace of our said lady the queen, her crown and dignity."

The defendant was convicted on this indictment before Mr. Justice ERSKINE, at the Winter Assize of 1843.

F. Russell, for the defendant, then objected, in arrest of judgment, that the averment of materiality contained in the indictment was insufficient,

as it merely stated that it was material and necessary for the magistrate to inquire of and be informed by the present defendant whether he saw Henry Liversuch at all during the 12th of August, without going on to add that it was material to the inquiry as to the trespass with which Henry Liversuch was charged.

ERSKINE, J., postponed giving judgment, that he might confer with the other learned judges on the point.

The case having been considered by the judges in Hilary Term, the judgment was now given.

ALDERSON, B., (to the defendant.)—You were charged at the last assizes, before Mr. Justice ERSKINE, with having committed wilful and corrupt *369] perjury, and an objection *was taken to the form of the indictment on which you were convicted, and a motion made in arrest of judgment. The learned judge reserved the case, in order that he might consult with the other judges upon it. The matter has been considered by some of them, and I am now to inform you of the result of that consideration. This indictment charges that you, who were duly sworn on a matter stated in the indictment to be in issue before a justice of the peace, swore and took your corporal oath to speak the truth touching a certain charge before the justice, and gave certain evidence as to whether you had seen a man of the name of Henry Liversuch at a particular period mentioned in the indictment, and you stated that you did not see him, which statement was corruptly and wilfully false in the opinion of the jury by whom you have been convicted; but the indictment only charges, that, at the time when you, the said Christopher Bartholomew, swore as aforesaid, it was material and necessary for the said Thomas Scott, as such justice of the peace as aforesaid, to inquire of and be informed by you, the said Christopher Bartholomew, whether you, the said Christopher Bartholomew, had seen him, the said Henry Liversuch, at or during that period. It is not stated that it was a material and necessary question in the inquiry before the said Thomas Scott, to which you gave the false and corrupt answer. It may have been, therefore, consistently with the averments in this indictment, material and important for Thomas Scott, in some other matter, and not in the matter stated to be in issue before him, to have put this question, and received this answer. Now, as the offence of perjury consists in taking a false oath in a matter stated to be in judgment before a court or person having competent authority to decide it, and as this indictment does not clearly and distinctly charge that, it does not charge the offence of perjury. We think, therefore, that this indictment is *370] not sufficient, and that the judgment must be arrested. This *is the result to which, on consultation with the other judges, Mr. Justice ERSKINE tells me that he has arrived. Judgment arrested.

'Espinasse, for the prosecution.

F. Russell, for the defendant.

REGINA v. CROWHURST.

Where a person on whom stolen property is found gives to those who find him in possession of it a reasonable account of how he came by it, it is incumbent on the prosecutor, on the trial, to show that that account is untrue. *Aliter*, if that account be unreasonable or improbable on the face of it.

Where a piece of wood, which had been stolen, had been found by a constable in the possession of the prisoner five days after it was lost, who said that he had bought it of N., who lived about two miles off:—*Held*, that it was incumbent on the prosecutor to negative this explanation.

LARCENY.—The prisoner was indicted for stealing a piece of wood, the property of a person named Harman.

It appeared from the evidence given on the part of the prosecution, that, on the piece of wood being found by a police-constable in the prisoner's shop, about five days after it was lost, he stated that he bought it from a person named Nash, who lived about two miles off. Nash was not produced as a witness for the prosecution, and the prisoner did not call any witness.

ALDERSON, B., (in summing up.)—In cases of this nature you should take it as a general principle, that, where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him. Suppose, for instance, a person were to charge me with *stealing this watch, and I were to say I bought it from a particular tradesman, whom I name, that is *prima facie* a reasonable account, and I ought not to be convicted of felony unless it is shown that that account is a false one.

Verdict—Not guilty.

Horn, for the prosecution.

F. Russell, for the prisoner.

HERTFORD ASSIZES.

(*Crown Side.*)

BEFORE BARON ALDERSON.

REGINA v. MARGARET M'CONNELL and CONSTANCE SCOTT.

A person who knowingly utters a forged pass of a discharged prisoner, purporting to have been given under the stat. 5 Geo. 4, c. 85, may be convicted of uttering a "forged warrant and order for the payment of money," although the forged pass be not precisely in the form given by that statute, and although it does not purport to be sealed with the county seal, or any seal provided for the purpose, the only seals to it being two small pieces of paper affixed to it by wafers.

A woman who applies to a relieving officer for money on such a forged pass, and produces it to him, may be convicted of uttering a forged warrant and order for the payment of money, although the forged pass direct the money mentioned in it to be paid to "*William Henry*," on his giving a receipt.

FORGERY.—The first count of the indictment was in the following form:—"The jurors for our lady the queen upon their oath present, that Margaret M'Connell, late of the parish of Tring, in the county of Hertford,

spinster, heretofore, to wit, on the 1st day of December, in the year of our *372] Lord 1843, at the parish aforesaid, in the county *aforesaid, feloniously did falsely forge and counterfeit *a certain order for the payment of money*, which said false, forged and counterfeit order for the payment of money is as follows: that is to say,—

CERTIFICATE, ROUTE, AND DESCRIPTION OF DISCHARGED PRISONERS, UNDER THE 5 GEO. 4.

CERTIFICATE.

Whereas, by the act of Parliament of the 5th Geo. 4, cap. 85, prisoners discharged from prison may, upon application to the visiting justices of such prison, become entitled to certain allowance from the overseers of the poor of any place through which they may pass, on their way to the places of their settlement, under authority of a route and certificate of two such visiting magistrates. And whereas William Henry, his wife, and eight children, corresponding in appearance, and the account he gives of himself, to the description aftermentioned, has come before us, two of the visiting justices of the House of Correction at Sandwich, and is deemed by us to be a fit object to receive the regulated allowances under the said act, this is to certify the same, and to require the overseers of the poor of the places mentioned in the route to issue to the discharged prisoner the allowances specified in the said route, as required by the said act of Parliament; provided that the discharged prisoner produces the said route himself, and that the description corresponds with his appearance, and agrees with the account he gives of himself, and the number of children he has with him. Given under our hands and seals, this 20th day of November, 1843.

EDWARD KNATCHBULL. [Seal.]

J. WILKES, [Seal.]

This pass is to be in force thirty days from the date hereof.

N. B.—To prevent frauds, all parish officers are not to give the allowance granted by the aforesaid act under the authority of any other form or pass than this, which is prescribed in the schedule to the act of Parliament aforesaid.

*373] *Route for William Henry, his } From Sandwich, in the county of Kent, to
 wife and eight children, } Kenelworth, in the county of Warwick.

A.	B.	C.	D.	E.	
<i>Names of Places through which the discharged Prisoner is to travel.</i>	<i>Rate per Mile for the dis- charged Prison- er and Chil- dren, if any.</i>	<i>Distance of Place where Relief is ad- vanced to that where it is to be continued.</i>	<i>Sum paid by each Overseer.</i>	<i>Signature of each Overseer paying the discharged Prisoner.</i>	<i>Remarks.</i>
	Elevenpence per Mile.		£ s. d.		
Sandwich . .		12 miles	0 11 0	Wm. Brown	Overseer.
Canterbury . .		23 ditto	1 1 1	Wm. Muson	Ditto.
Chatham . .		17 ditto	0 15 7	G. Williams	Ditto.
Dartford . .		15 ditto	0 13 9	F. Seamour	
St George's in the Borough, } London . . }		17 ditto	0 15 7	G. Andrews	Ditto.
Watford . .		16 ditto	0 14 8	J. Good.	Ditto.
Tring . .					
Winslow . .					
Brackley . .					
Kineton . .					
Warwick . .					
Kenelworth . .					
Total Amount paid, £					

Directions for filling up the Passes.

The magistrate is to fill up the description, and to insert in the column marked A. the names of the places through which the discharged prisoner is to travel; and in the column marked B. (in words) the allowance per mile which he (or she) is to receive; and also to write the number of children, in words, in the proper column, in the third page; and, when there are no children, to strike out that part of the form. In case of any mistake, the magistrate should make the necessary alteration with a pen, and write his name opposite thereto. The overseer of the poor will insert in the column marked C the distance of the place to which he advances the allowance; in that of D. the sum he gives the discharged prisoner; and in that marked E. will sign his own name, specifying the parish for which he acts. He is also to take before a magistrate any person that presents a pass in which there are any alterations other than with a pen as above directed.

*Description of the discharged Prisoner.

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Prisoner's Name.	Age.	Height.		Colour of			Dress.	Number of Children.			
		Feet.	Inches.	Hair.	Eyes.	Complexion.		Boys.	Agas.	Girls.	Agas.
William Henry.	42	5	6	Brown.	Hazle.	Florid.	Dark coat, brown waistcoat, and black trowsers.	Four.	One 18, one 12, one 8, and one 6 years.	Four.	One 16, one 14, one 10, and one 4 years.

Memorandum for the guidance of the Overseers of the Poor, Treasurers of Counties, and Keepers of Prisons.

Each overseer is to take a receipt from the discharged prisoner, signed with his or her name or mark, and he is to be reimbursed the money paid by the treasurer of the county in which he serves the office of overseer, on him giving a receipt for the same, together with the discharged prisoner's receipt. The overseer who makes the last advance, to carry the discharged prisoner to his place of residence, is to send the certificate, route, and pass to the keeper of the prison from which the prisoner was discharged, and the said keeper shall make and sign a declaration in the form herein next after annexed, which said declaration shall be attested by one visiting justice of the said prison. The overseer is to send the pass by post, folded so as to show the direction herein endorsed, (or in a cover, open at the sides, directed in a similar manner,) and he is not to send or write any thing therein, except what may be required in the columns, C. D. E.

Declaration of the Keeper of the Prison.

I, —, keeper of the house of correction at —, in the county of —, do declare that this pass both came to me without cover (or in a cover open at the sides) and without any paper or thing enclosed therein, and without any writing other than the matter of such pass, and than the superscription upon the same or upon the cover thereof.

I, —, one of the visiting justices of the said prison, do attest, that, after due examination, I do believe the aforesaid declaration to be true.

Dated this — day of —,

with intent to defraud one Joseph Blake, against the form of the statute in such case made and provided, and against the peace of our said lady the queen, her crown and dignity. And that Mary Murphy, [*375]

late of the parish aforesaid, in the county aforesaid, spinster, and Constance Scott, late of the same place, spinster, before the felony and forgery was done and committed in manner and form aforesaid, to wit, on the day and the year aforesaid, at the parish aforesaid, in the county aforesaid, feloniously did aid, abet, counsel, and procure the said Margaret M'Connell the felony and forgery aforesaid, in manner and form aforesaid, to do and commit, against the form of the statute in such case made and provided, and against the peace of our said lady the queen, her crown and dignity. The *second* count was a similar count for uttering the same forged instrument, (setting it out.) *Third and fourth* counts, for forging and uttering an order for the payment of money with the like intent, but not setting out the instrument. *Fifth, sixth, seventh, and eighth* counts, like the first four, but designating the forged instrument as a "forged warrant for the payment of money." The indictment also contained eight other counts, precisely similar to the first eight counts, except that the intent was laid to be to defraud Edward Woodman, and eight other similar counts, in which the intent was laid to be to defraud Philip Longmore.

It appeared that the prisoner, Margaret M'Connell, in company with the other prisoner, Constance Scott, applied to Joseph Blake, the relieving officer of the Berkhamstead Union, in the county of Hertford, for payment of money under the pass described in the indictment, and that the prisoner M'Connell then represented herself as the wife of William Henry, the discharged prisoner named and described in the pass, and stated, as a reason for his not presenting it personally, that he was sick, and had gone forward, leaving the pass with her; but she afterwards stated that he was too drunk to come with it himself. In consequence of these suspicious circumstances, the relieving officer did not give her any money, but caused *376] her and the other prisoner to be forthwith apprehended. The *relieving officer stated, that, except as relieving officer, he was not an overseer of Berkhamstead; but he also stated, that he was authorized by Mr. Woodman, the overseer, to pay money to persons producing such passes as these. It was proved that the pass was forged in all respects, and the seals to it were two small pieces of paper affixed to it by wafers.

W. Payne, for the prisoner M'Connell.—I submit that the present indictment cannot be sustained. 1st, because the pass produced would not have been a legal instrument even if genuine, as it is not in strict conformity with the form given by the stat. 5 Geo. 4, c. 85. By the 23d section of that statute, the justices of every county in their quarter sessions are to cause engraved copper-plates or printed forms of passes to be provided in the form in the schedule to that act, and those forms are to be used by the visiting justices of each prison. This instrument is not in the form there given; as in this instrument, in the directions for filling it up, the words "*the passes*" are put instead of "*these passes*;" and in the directions to the overseer, to take before a magistrate any person that presents a pass in which there are alterations other than with the pen as directed, this instrument superfluously inserts the word "any" before the word "alterations," and contains the words "*a pen as above directed*," instead of "*the pen as above directed*:" and in the directions for the overseer being reimbursed by the treasurer of the county, the words "*him giving a receipt*" are inserted instead of the words "*giving him a receipt*," which are the words of the act of Parliament; and it neither purports to be under the county seal, nor under any seal provided for the purpose, which is also required by the act. 2d, this instrument not being presented

by William Henry, the man named and described in it, as the statute requires, it was not an order for the payment of money, in consequence of the restriction therein contained. 3d, as Joseph Blake, *the relieving officer, was not an overseer, an uttering to the agent of the overseer is not sufficient to support those counts which lay an intent to defraud Mr. Woodman. [*377]

ALDERSON, B.—I will reserve these points for the consideration of the fifteen judges.

Verdict—Guilty of uttering as to both the prisoners, M'Connell and Scott.(a)

Thesiger and *Ogle*, for the prosecution.

W. Payne, for the prisoner M'Connell.

Charnock, for the prisoner Scott.

Before Lord DENMAN, C. B. ; TINDAL, C. J. ; POLLOCK, C. B. ; PARKE, B. , ALDERSON, B. ; PATTESON, J. ; GURNEY, B. ; WILLIAMS, J. ; COLTMAN, J. ; ERSKINE, J. ; ROLFE, B. ; and CRESSWELL, J.

W. Payne, for the prisoner M'Connell.—The stat. 5 Geo. 4, c. 85, requires that these passes shall be sealed with the county seal, or with a seal to be specially provided ; and by the schedule to that act no money ought to be paid by the overseers unless the pass be in the form given by the act. Where an instrument, if genuine, is required to be sealed, it would, I submit, be no forgery of the instrument to counterfeit it without a seal ; and if an instrument must be under the great seal or under the seal of the Poor-law Commissioners, it could hardly be said to be forged if the only seal to it was a piece of common paper affixed to it by a wafer : the seal ought to bear such a resemblance as is calculated to deceive. In the case of *Rex v. Donnally and Murray*, 1 M. C. C. 438, the prisoners had pleaded guilty to an *indictment for uttering a warrant and order for the payment of money, which was sent out in the indictment, and which was a forged order for relief to a discharged prisoner under the stat. 5 Geo. 4, c. 85 ; but the forged instrument being in many instances ungrammatical, and at variance with the form given in the act, the judges held the conviction bad. But in that case the forged instrument differed considerably from the form given in the act.(b) Another objection to the instrument is, that it does not state the two justices to be justices of any county either of England or Wales ; but they are merely stated to be visiting justices of the house of correction at Sandwich. The order also, if it be an order, is conditional, as it is not an order to pay the bearer, but to pay William Henry himself, and take his receipt. In the case of *Rex v. Rushworth*, R. & R., C. C. 317, the prisoner was indicted for uttering a forged order for the payment of money. By the forged order, which purported to be under the hand of Mr. Taylor, a magistrate, the treasurer of the West Riding of Yorkshire was required to pay to the constable of Horbury on his order the sum of 4l. 10s. for conveying vagrants to the house of correction ; but as the order was not under seal, as required by the stat. 17 Geo. 2, c. 5, and as it was not an unconditional order, but to be paid on the order of the constable, and the prisoner was known not to be the constable of Horbury, Mr. Justice BAYLEY thought it not such an order for

(a) The prisoner Murphy was not tried, not being in custody.

(b) See, the case of *Rex v. Chisholm*, R. & R., C. C. 297, cited 2 Greav. ed. of Rurs. C. & M. 498.

the payment of money as was within the statute, and directed an acquittal; and the twelve judges thought that direction right. I submit, also, that this is not a warrant and order for the payment of money, but that it is a pass. The stat. 5 Geo. 4, c. 85, all through speaks of it as a pass. A lease would not, as I submit, be a warrant or order for the payment of money, merely because it might contain an engagement to pay rent; nor would a *379] will be a warrant or order *for the payment of money, because it directed the payment of a legacy. In the case of *Rex v. Wilcox*, R. & R., C. C. 50, which was an indictment at common law for forging "a certain paper instrument partly written and partly printed in the words and figures following," (setting it out,) the judges "were of opinion that the indictment was bad, as it did not state what the instrument was in respect of which the forgery was alleged to have been committed, nor how the party signing it had authority to sign it; and the judgment was consequently arrested." (a) With respect to the person to whom the pass was uttered, I submit, that, as Mr. Blake was a distinct officer and not a servant of Mr. Woodman, an uttering to Mr. Blake was not sufficient, and Blake's refusal could not have subjected Woodman, the overseer, to be indicted for refusing to pay, the statute requiring the payment to be made by the overseer, who is to sign his own name in one of the columns of the pass.

Waddington, for the Crown, was not heard.

The judges afterwards considered the case, and held the conviction right.

(a) The forged instrument in that case purported to be a ticket of the weight of a quantity of coals from the Sarum public weighing engine, and purported to be signed — "Witness, William Wort, book-keeper."

*380] *OXFORD SPRING CIRCUIT, 1844.

BEFORE BARON PARKE AND MR. JUSTICE COLERIDGE.

BERKSHIRE ASSIZES.

(*Civil Side.*)

BEFORE BARON PARKE.

BUNBURY, Esq., v. MATTHEWS.

In an action by a sheriff for his poundage, proof that he has acted as sheriff is sufficient evidence of his being so, without proof of his appointment. In an action for sheriff's poundage, the sheriff's officer produced the sheriff's warrant under which he had acted, which concluded, "given under the seal of my office." The only seal to it was a small piece of blue paper wafered to it, and stamped with a wafer stamp. The officer stated that he did not know this to be the seal of the sheriff, or of his office, but stated that he had received the warrant from Mr. B., who had acted as the plaintiff's under-sheriff, and that it was precisely similar to all the other warrants on which he had acted:—*Held*, sufficient proof of the seal.

Seemle, that the stat. 5 & 6 Vict. c. 98, which provides, that, after the 1st of March, 1843, sheriff's poundage shall not be "payable" on writs of ca. sa., does not apply to cases where the party has been taken on the ca. sa. before that day; but if it does, a defend-

ant, in an action for sheriff's poundage, cannot take advantage of that defence on the plea of *nunquam indebitatus*, but must plead it specially.

DEBT.—The declaration stated, that “heretofore and before the 1st day of March, 1843, to wit, on the 30th day of August, 1842, the defendant was indebted to the plaintiff in 6*l.* 6*s.* 11*d.*, for certain poundage and fees due and owing and of right payable from the defendant to the plaintiff as sheriff of the county of Berks, upon and for the execution of a certain writ of *capias ad satisfaciendum*, and divers other writs for the defendant by the plaintiff, as such sheriff as aforesaid, and whilst he was such sheriff, before then executed for the defendant, at his request, and for divers fees due and owing and of right payable from the *defendant to the plaintiff, as [*381 such sheriff, upon and for the plaintiff's having, as such sheriff, granted divers warrants to divers officers, upon and for the execution of the said writ and writs for the defendant, and at his request.” Second count upon an account stated.

Plea, Nunquam indebitatus.

On the part of the plaintiff, a writ of *capias ad satisfaciendum*, dated the 27th of August, 1842, directed to the sheriff of Berkshire, to take John Groves, at the suit of Felton Matthews, endorsed, “Take to satisfy 143*l.* 19*s.* and interest thereon, as within,” was put in; this writ being admitted under an order of Baron ALDERSON, upon a notice to admit, in which it was described as follows:—“Writ of *capias ad satisfaciendum*, issued out of her majesty's Court of Exchequer of Pleas, against John Groves, at the suit of the above-named defendant, directed to the sheriff of Berkshire,(a) date, 27th of August, 1842.” “Original.”

It was proved by a sheriff's officer, named Stephens, that Mr. Bunbury, the plaintiff, had acted as high-sheriff of Berkshire from the month of February, 1842, to the month of February, 1843, and that Mr. Barnes had acted as Mr. Bunbury's under-sheriff during that time. This witness also produced and put in the sheriff's warrant, founded on the before-mentioned writ, to take John Groves. He stated that he received the warrant from Mr. Barnes, the under-sheriff, on the 29th of August, 1842, and took John Groves upon it on the 3d of January, 1843.

The warrant was in the usual form, and concluded, “Given under the seal of my office,” &c. The seal was merely a small square piece of blue paper, wafered on to the warrant, and impressed with a wafer stamp.

The witness Stephens, being asked by *John Gray*, for the defendant, whether he knew this to be the seal of the *sheriff's office, stated [*382 that he did not know that it was so, but that this warrant was precisely similar to all others that he had received during the shrievalty of Mr. Bunbury; and that he had received it from Mr. Barnes, who had always acted as Mr. Bunbury's under-sheriff; the warrant being then in the same state as when produced and given in evidence.

John Gray, for the defendant.—This warrant is not proved to be under the seal of the sheriff. The warrant says, “Given under the seal of my office;” but the seal does not purport to be the seal of any one; and the witness does not know it to be the seal of the sheriff or of his office.

PARKE, B.—I think, as he received it from the under-sheriff, and as it is similar to all the other warrants he received, that is sufficient proof of the seal.

(a) The words “being the above-named plaintiff” were here originally inserted in the notice to admit, but were struck out before the learned baron, on his making the order to admit.

Carrington, for the plaintiff, proposed to put in the duplicate warrant of appointment of the plaintiff as sheriff of Berkshire, signed by the clerk of her majesty's privy council, and deposited in the office of the clerk of the peace, under the stat. 3 & 4 Will. 4, c. 99, ss. 3 & 4.

PARKE, B.—It is unnecessary. The evidence you have already given that the plaintiff acted as sheriff is quite sufficient.

The evidence was not given.

John Gray, for the defendant.—By the stat. 5 & 6 Vict. c. 98, s. 31, it is enacted, "That, after the 1st day of March, 1843, no poundage shall be payable to sheriffs, bailiffs, and others, for taking the body of any person in execution," but there shall be payable to the sheriff or other person *383] having the return of writs such fees only as shall be allowed by the authority of the judges under the stat. 7 Will. 4, & 1 Vict. c. 55. This provision is not limited to cases where the execution is sued out, and the party taken after the 1st of March, 1843, but is a general enactment that no poundage shall be payable after that day.

PARKE, B.—I think that that enactment means that no poundage is to be payable for what is done after that day, and that it does not apply to this case, where the party was taken in execution before the 1st of March, 1843. But even if your construction of the statute be the correct one, you cannot avail yourself of it as a defence under your present plea of *nunquam indebitatus*; because, even according to your own construction of the act, the defendant was at one time indebted to the plaintiff, namely, from the 3d of January, 1843, to the 1st of March, 1843, and that being so, the plea of *nunquam indebitatus* is improper, and the defendant should have pleaded specially. There must be a verdict for the plaintiff.

Verdict for the plaintiff for 6*l.* 6*s.*; that being 5*s.* for the warrant, and the residue for the poundage.

Carrington and Tyrwhitt, for the plaintiff.

John Gray, for the defendant.

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*(*Crown Side.*)

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. JACKSON.

It was the duty of a servant, authorized to receive money for his employer, to account to his employer on the evening of every day for the money received during the day by him for his employer, and to pay over the amount. He received three sums for his employer on three different days, and neither accounted for those sums, nor paid them over. He never denied the receipt of them, or rendered any written account in which they were omitted:—*Held*, that, if the servant wilfully omitted to account for these sums, and pay them over on the respective days on which he received them, these were embezzlements, and that such wilful omissions to account and pay over were equivalent to a denial of the receipt of them.

EMBEZZLEMENT.—The first count of the indictment charged, that the prisoner, being the servant of Elizabeth Dolby, received for her, by virtue of his employment, the sum of 3*l.* 9*s.* 6*d.* on the 4th of November, 1843, and feloniously embezzled the same; second count, for embezzling a sum of 4*l.* 9*s.* 8*d.* on the 29th of September, 1843; third count, for embezzling a sum of £1 on the 18th of December, 1843; fourth count, for a larceny.

It was proved that the prisoner was, at all the times mentioned in the indictment, the servant of Mrs. Dolby, who was a baker at Winkfield; and that the prisoner was authorized to receive money due to her from her customers.

It was also proved that, on the 4th of November, 1843, the prisoner received the sum of 3*l.* 9*s.* 6*d.* of Mary Taff, the servant of Mr. Briant, a customer of Mrs. Dolby, in payment for bread supplied to him by her; that the prisoner also received the two other sums mentioned in the indictment, at the respective times mentioned in the indictment, of Mr. Strickland, and of Harriet Rowlinson, the servant of Mr. Thomas Ward, in payment for bread supplied by the prosecutrix.

It was further proved by Mrs. Dolby, that the prisoner had never accounted to her for either of these sums, or for any part of them, and had never paid any part of them over to her. In her cross-examination, Mrs. Dolby stated that the prisoner had never denied the receipt of either of the sums, and had never delivered any account in writing in which they were omitted; but, in re-examination, she said, that it was [385 not the duty of the prisoner to deliver to her written accounts of what he received, but that it was the duty of the prisoner, on the evening of every day, to render an account to her of all the moneys that he had received on her account in the course of that day, and immediately pay over to her the amount.

J. Jeffreys Williams, for the prisoner.—I submit that this is no embezzlement. There is no denial of the receipt of either of these sums, and the omission by a clerk or servant to pay over moneys he has received is not embezzlement. This appears from the cases of *Rex v. Hodgson*, 3 C. & P. 422; and *Regina v. Norman*, C. & Mar. 501.(a)

COLERIDGE, J.—What Mrs. Dolby said in her re-examination puts an end to this objection. She says that it was the duty of the prisoner every evening to account for and pay over to her all moneys received by him for her in the course of the day. If he wilfully omitted to do that, I am clearly of opinion that that is quite equivalent to a denial of the receipt of the money.

Verdict—Guilty.

Carrington, for the prosecution.

J. Jeffreys Williams, for the prisoner.

(a) In the case of *Rex v. Hodgson*, the prisoner had, in his regular account, debited himself with all the money he had received, but had not transmitted his balances from Newcastle-under-Lyne to Liverpool, as he ought to have done; and in the case of *Regina v. Norman*, the prisoner, in rendering his account, admitted the appropriation of the property alleged to have been embezzled, claiming to have it as a matter of right, founded on an alleged custom in the trade.

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*OXFORD ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE COLERIDGE.

DOE on the Demise of BURROWS *v.* FREEMAN.

An examined copy of the court-roll of a manor, made for the purpose of being given in evidence on a trial, does not require a stamp. A copy of court-roll duly stamped purported to be signed by Mr. V., who was proved to be the steward of the manor. The lessor of the plaintiff's attorney, who produced it, did not know the handwriting of Mr. V.; but he stated that he had shown this copy of court-roll to Mr. V., who stated that it had been delivered out by him, as steward of the manor, to the lessor of the plaintiff:—*Held*, that this acknowledgment of it by Mr. V. was equivalent to the witness having received it from Mr. V., as steward of the manor.

EJECTMENT for copyhold premises situate at Launton, in the county of Oxford.

On the part of the lessor of the plaintiff it was proposed to give in evidence an examined copy of the court-rolls of the manor of Launton, of the admittance of William Freeman to the premises in question in the year 1815. It was proved by Mr. Chappell, the attorney for the lessor of the plaintiff, that he had examined this copy with the original court-roll of the manor. This copy had been made for the purpose of being given in evidence in this cause, and was unstamped.

Talfourd, Serjt.—I submit that this copy of the court-roll cannot be received in evidence, as it is not stamped. By the Stamp Act, 55 Geo. 4, c. 184, sched., part 1, "The copy of court-roll of any admittance in court," must be stamped, although "the court-rolls or books of any manor wherein the proceedings relating thereto shall be entered or minuted," are exempted from stamp duty; and this very exemption of the original by express words shows that all copies of the court-rolls must be stamped. In the case of *Doe d. Cawthorn v. Mee*, 4 B. & Ad. 617, it was held that
 *387] the 48 Geo. 3, c. 149, s. 32, which *required that every surrender of copyhold and admittance, &c., made *out of court*, or a memorandum thereof, shall be stamped; and sect. 33, which enacted, that, in cases of surrender, &c., *out of court*, the steward should make and deliver to the tenant a stamped copy of the court-roll, were merely revenue regulations, and not intended to vary the rules of evidence; and that, therefore, a surrender and admittance out of court, presented and enrolled afterwards, might be proved by an examined copy of the court-roll, without producing the original surrender, &c., or the memorandum thereof; but in that case the examined copies were stamped.

Whateley and Keating, for the lessor of the plaintiff.—A stamp is only required to "the copy of court-roll," which is made by the steward, and delivered by the steward of the manor to the tenant as his title-deed, and not to any copy made by a private individual for his own purposes, and by him examined with the original.(a)

(a) In the case of *Braithwaite v. Hitchcock*, 10 M. & W. 494, and 2 D. P. C., N. S., 444, a deed of assignment of a lease was called for under a motion to produce, and not being produced, a witness produced a document, which he stated was a true copy of the

*COLERIDGE, J.—I never saw an admittance to a copyhold proved in this way; but, if there is no other evidence of it, I will [*388 receive this examined copy, and give leave to move to enter a nonsuit.

The evidence was received.

Mr. Chappell also produced a copy of court-roll of the same manor, dated in the year 1843, of the admission of the lessor of the plaintiff. This was written on parchment, and was duly stamped, and purported to be signed by Mr. Vincent, who was proved to be the steward of the manor of Launton, of which the dean and chapter of Westminster were the lords. Mr. Chappell stated that he did not know the handwriting of Mr. Vincent, but that he had shown this copy of court-roll to Mr. Vincent, who stated to him that it was the copy of court-roll that had been delivered out by him as steward of the manor to the lessor of the plaintiff, and that it was his signature at the foot of it.

Tufourd, Serjt.—I submit that what Mr. Vincent said is no proof of his signature.

*COLERIDGE, J.—The witness showing the court-roll to the steward, and the steward acknowledging it, is the same as if he had [*389 received it from the steward. Verdict for the plaintiff.

Whateley and Keating, for the plaintiff.

Tufourd, Serjt., and *W. J. Alexander*, for the defendant.

In the ensuing term, *Tufourd*, Serjt., applied to the Court of Exchequer for leave to enter a nonsuit, in pursuance of the leave given at the trial, but the court refused a rule.

original assignment, which he had seen. It was objected, that this copy was inadmissible, for want of a stamp. Lord Abinger received the evidence, giving leave to move on the point. Mr. Erle afterwards moved in the Court of Exchequer, and contended that this copy was not receivable in evidence, being unstamped; as, by the stamp acts, 44 Geo. 3, c. 98, and 48 Geo. 3, c. 149, sched. 1, pt. 1, a duty is imposed on every "copy attested to be a true copy, in the form which hath been commonly used for that purpose, or in any other manner authenticated or declared to be a true copy, or made for the purpose of being given in evidence as a true copy of any agreement, contract, bond, deed, or other instrument of conveyance, or any other deed whatsoever;" it being also declared by the stat. 48 Geo. 3, c. 149, sched. 1, pt. 1, that "all copies which shall at any time be offered in evidence shall be deemed to have been made for that purpose." The Court of Exchequer held, that the copy of the deed offered in evidence did not require a stamp; and Lord Abinger, C. B., said, "I think the provisions of the Stamp Act relate only to such copies as are evidence per se, and that the word 'copy' there means an *authenticated* copy, receivable as evidence in the first instance. Here the copy was evidence only because the party who produced it had compared it with the original, and swore to the contents of it word for word." And Baron Parke said, "I quite agree with my Lord Chief Baron, that no stamp was requisite; inasmuch as, though the document might in form have been read as a copy of the original, it was in truth read only as a memorandum to refresh the memory of the witness, who had compared it with the deed." And it is also observed by Baron Rolfe, that it is evident that the word "copy" is not used in its ordinary sense, as a higher rate of duty is imposed where the copy is for a person taking a benefit or interest under the deed, and a lower where it is for a person not taking such interest or benefit.

WORCESTER ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. HAIR.

If an indictment for perjury be removed by certiorari at the instance of the defendant, and be entered for trial on the Nisi Prius side of the assizes by the defendant, the judge will not stop the case from being tried on a motion on the part of the prosecution, on the ground that the prosecutor has not had sufficient notice of trial; but, if the defendant is acquitted, no one appearing for the prosecution, it will be a mis-trial if proper notice of trial had not been given.

PERJURY.—This was an indictment for perjury, which had been removed into the Court of Queen's Bench by certiorari, and was entered for trial on the Nisi Prius side of the assizes.

*390] *Godson*, for the prosecution, moved that this case should *not be tried. The Nisi Prius record had been brought down and entered by the defendant; and by the stat. 14 Geo. 2, c. 17, s. 4, ten days' notice of trial must be given to the prosecutor; and the present motion was made on an affidavit, which stated, that notice of trial had been served on the 28th of February last, which was only eight days before the present time, and only seven days before the commission day.

COLERIDGE, J.—I cannot interfere to prevent the case from being called on, upon this ground. This case must be called on in its order. If the defendant is acquitted, no one appearing for the prosecution, it will be a mis-trial, if there has not been proper notice of trial.

The case was called on in its order for trial, and, no one appearing for the prosecution, the defendant was acquitted.

Godson and *F. V. Lee*, for the prosecution.

Talfourd, Serjt., and *W. A. Hill*, for the defendant.

DOE on the demise of MILLER and Others v. ROGERS.

In ejectment on the demise of "G. M. and Sarah his wife, Joyce Child, Armand Shallon and Eleanor his wife, S. B. and Ann his wife," the female lessors of the plaintiff made out their title as co-heiresses of Jonah Child. It appeared that the husband of Eleanor was an Egyptian, but no evidence could be given that his first name was Armand. The judge, at the trial, allowed the record to be amended by striking out the name of Armand, and held that the fact that Shallon was an alien would not prevent the lessors of the plaintiff from recovering in the present ejectment.

EJECTMENT, to recover a house at Stourbridge.

The ejectment was on the demise of "George Miller and Sarah his wife, Joyce Child, Armand Shallon and Eleanor his wife, and Samuel Brown and Ann his wife;" and the female lessors of the plaintiff claimed the property as the daughters and co-heiresses of Jonah Child.

*391] *It appeared that the husband of Eleanor was an Egyptian, who had married her, and afterwards gone back to Egypt. None of the witnesses knew his first name to be Armand, and they only knew him by the name of Shallon, and did not know that he had any other name.

Talfourd, Serjt., for the lessors of the plaintiff, asked for leave to amend the record, by striking out the name of Armand.

COLERIDGE, J.—I shall allow the amendment.

Godson, for the defendant.—As this Egyptian is an alien, he cannot hold lands.

COLERIDGE, J.—He is at the most only seised in right of his wife, and I think you cannot make any thing of this objection.

Verdict for the plaintiff.(a)

Talfourd, Serjt., and *W. J. Alexander*, for the plaintiff.

Godson, for the defendant.

(a) We do not find any express authorities as to lands of which a wife, being a British subject, is seised in fee, she having a husband who is an alien. Lord Coke says, (Co. Litt. 2 b,) "If an alien, Christian or infidel, purchase houses, lands, tenements, or hereditaments, to him and his heires, albeit he can have no heires, yet he is of capacite to take a fee-simple, but not to hold, for upon an office found, the king shall have it by his prerogative."

In *Page's case*, 5 Co. 52 a, it was resolved by Sir Roger Manwood, Chief Baron, and the whole Court of Exchequer, that "an office found by force of a commission under the Exchequer seal is not sufficient to entitle the queen to the lands of an alien born; for there are two manner of offices, one that vests the estate and possession of the land, &c., in the queen where she had but a right or title before, and that [*392 is called an office of intitling, as in case of purchase by an alien;" "and such office which concerns fee or freehold ought to be by force of a commission under the great seal of England. There is another office, and that is called an office of instruction, and that is when the estate of the land, &c., is lawfully in the king before, but the particularity of the land, &c., does not appear of record so that it may be put in charge; as, if one be attainted of high treason, all his lands, &c., are presently, by the stat. 23 Hen. 8, c. 20, in the king." "But it doth not appear to the Court of Exchequer of what lands the person attainted was seised at the time of his attainder or after, and if that be found by office by a commission under the Exchequer seal, it is a sufficient record to instruct the king of the certainty of the land, &c., by which it may be put in charge." "It was resolved, in the case of an alien, the inheritance or freehold of the land is not vested in the king till office found under the great seal, for that is an office of intitling. If an alien and a subject born purchase land to them and their heirs, they are joint-tenants, and shall join in an assize, and till office found the survivor shall hold place."

From the case of *Duplessis v. The Attorney-General*, 1 Br. P. C. 415, Toml. ed., it appears that an alien can take lands by devise, and hold them till office found under the great seal; and that, his disability being neither a penalty nor forfeiture, the alien cannot demur to an information filed by the Attorney-General for discovering the place of his birth, in order to establish the fact of alienage.

In *Anon.*, 1 Leon. 47, Lord Chief Justice Anderson says, "When an alien is enfeoffed he receiveth by the livery the fee-simple of which he shall be seised until office be found." In the 4th volume of the same reports, p. 82, there appears to be another report of the same case. In Blackstone's Com., bk. 2, ch. 8, it is laid down that "an alien cannot be endowed unless she be queen consort;" but Mr. Justice Coleridge (in his edition of Blackstone's Com.) refers to an unpublished statute of 8 Hen. 5, by which it is enacted, that all aliens who thenceforth should marry Englishmen by license of the king should have their dower in the same manner as Englishwomen. That statute is not printed with the Statutes at Large, nor is it printed in the "Statutes of the Realm," by the Record Commission, but will be found in the Rolls of Parliament, vol. 4, p. 128.

In *Calvin's case*, 5 Co. 25 a, it is laid down, that, "when an alien born purchaseth any lands, the king only shall have them, though they be holden of a subject, in which case the subject loseth his seignory. And it is said in our books, an alien may purchase ad proscum Regis; but the act of law giveth the alien nothing, and therefore, if a woman alien marrieth a subject, she shall not be endowed, neither shall an alien be tenant by the curtesy."

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*(*Crown Side.*)

BEFORE BARON PARKE.

REGINA v. JOSEPH LINES.

If, on the trial of an indictment, for carnally knowing and abusing a female child under ten years old, the jury are satisfied, that, at any time, any part of the virile member of the prisoner was within the labia of the pudendum of the child, no matter how little, this is sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offence.

INDICTMENT for carnally knowing and abusing Emma Cox, a child under the age of ten years.

With respect to the penetration, it appeared, from the cross-examination of Mr. Wynn Williams, the surgeon, that the hymen of the child was not ruptured, but that upon the hymen there was a venereal sore, which Mr. Wynn Williams deposed must have arisen from actual contact with the virile member of a man.

Huddleston, for the prisoner.—I submit, that all these appearances were consistent with the fact of the private parts of the prisoner being in actual contact with the private parts of the child, and yet no penetration sufficient to constitute the whole offence may have taken place.

PARKE, B.—I shall leave it to the jury to say, whether, at any time, any part of the virile member of the prisoner was within the labia of the pudendum of the prosecutrix; for if ever it was, (no matter how little,) that will be sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offence.

Verdict—Not Guilty.(a)

Allen, for the prosecution.

Huddleston, for the prisoner.

(a) See the cases of *Regina v. Hughes*, 9 C. & P. 752, and the authorities there referred to, and the case of *Regina v. Stanton*, post, p. 415.

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*STAFFORD ASSIZES.

(Civil Side.)

BEFORE BARON PARKE.

On the Oxford Circuit, the practice is, that, whenever the commission-day of an assize is on any day except Saturday, the time for the entry of causes extends to twelve o'clock at noon on the day after the commission-day; but where the commission-day is on a Saturday, the parties must enter their causes before the sitting of the court on the following Monday, at whatever hour on that day the court may sit, the usual hour being nine o'clock.

Where the commission-day announced is Saturday, but, from pressure of business at another town, the commission-day be postponed till Monday, under the stat. 3 Geo. 4, c. 10, parties ought to be prepared to enter and try their causes at the sitting of the court on Monday.

In consequence of the pressure of business at Worcester, the commissions for the county of Stafford could not be opened on the very day

appointed for such purpose, and instead of being opened on Saturday, the 9th day of March, the day appointed, they were opened, under the stat. 3 Geo. 4, c. 10, on the morning of Monday, the 11th, by Baron PARKE, who having done so, attended divine service, charged the grand jury, and then proceeded to the trial of the *Nisi Prius* cases at one o'clock.

Talford, Serjt., before the first *Nisi Prius* case was called on, stated, that some doubt appeared to exist as to the time till which causes could be entered for trial. In ordinary cases, where the commission-day originally fixed was on a Monday, parties were allowed till noon on the Tuesday to enter their causes.

Mr. Bellamy, the clerk of the assize, (having been sent for by the learned baron,) stated that the practice on this circuit had always been, whenever the commission-day of the assize was on any day except Saturday, for the time for the entry of causes to extend to twelve o'clock at noon on the day after the commission-day; but that when the commission-day was on a Saturday, the parties must enter their causes before the sitting of the court on the Monday following, at whatever hour on that day the court might sit, the usual hour in such cases being nine o'clock. [*395]

Godson.—As the commission-day has been postponed from Saturday till to-day, many persons who had causes to try are under the impression that this is to be considered as the commission-day for all purposes, and that they have till noon to-morrow to enter their causes.

PARKE, B.—It is very inconvenient that the entry of causes should be thus delayed, and that all causes should not have been entered before the sitting of the court this day; however, as it may have been supposed that no *Nisi Prius* business would be taken to-day, I will not take any defended cause till to-morrow at noon, and in the mean time I will proceed with the trials of the prisoners; but I hope that at any future time, when it may be necessary to postpone the opening of a commission from Saturday to Monday, the parties will be ready in the causes at the sitting of the court on Monday.

REGINA v. WILLIAM BODEN.

A., at G. fair, came up to B., the prosecutor's father, (being a stranger to him,) and gave him eleven sovereigns to buy him a horse, and B. put them into his pocket. B. refused to give the eleven sovereigns back, and A. and the prisoner, who was in his company, assaulted him, but could not get the money from him. On the next day the prisoner asked B. for the eleven sovereigns; and at L. fair, on a subsequent day, the prisoner having seen the prosecutor receive seven sovereigns, demanded the eleven sovereigns of him, and then knocked him down, and tried to get the seven sovereigns out of his pocket.—*Held*, that there was such a semblance of a claim of right, that this was not an assault with intent to rob. *Held*, also, that, the intent to rob being negatived, the prisoner might be convicted of an assault under the 11th sect. of the stat. 1 Vict. c. 85.

ASSAULT, with intent to rob.—The prisoner was indicted for assaulting one Thomas Simcocks, with intent to rob him, on the 27th December, 1843, at Leek. It appeared that the father of the prosecutor had been at a fair at Congleton some days before the day of the alleged offence charged in the present indictment, and that a *person had there come up to him and given him eleven sovereigns into his hand, for the purpose [*396] of buying a horse, and that the prosecutor's father had put the money into his pocket, and refused to give it back. The person who gave him the money followed him to an entry in the town of Congleton, and there, in

company with the prisoner, assaulted him, and endeavoured to get the money out of his (the father's) pocket. The prosecutor came up and interfered; and on his saying that the person who had given his father the money was the man that had robbed Cotterell at Leek fair, that person ran away. It further appeared, that the prisoner called at the prosecutor's father's house the next morning, and demanded the eleven sovereigns, but the prosecutor's father refused to give them him, at the same time saying, that he would give the money to the man from whom he had received it, if he would come and ask for it. It was proved, that, at Leek fair, on the 27th of December, 1843, the prisoner saw the prosecutor receive seven sovereigns for a cow that he had sold, and followed the prosecutor, and said, "Pay me the eleven sovereigns you owe me;" and then knocked the prosecutor down, and put his hand into the pocket of the prosecutor, where he had seen the sovereigns placed, but was prevented from getting them, and the parties separated.

Greaves, for the prosecution, in opening the case, stated, that it was well settled, that, if a party, under an honest impression that he was entitled to any thing, took that thing away from another, it would not amount to larceny, although, in reality, he had no right to it; and he conceived that the same rule might apply to robbery; and therefore, if the prisoner assaulted the prosecutor with the honest impression and real belief that he had a right to get the sovereigns from him, he would not be guilty of the offence charged, although it was clear, that, as the prosecutor never received the sovereigns, and the sovereigns were not the property of the *397] prisoner, he had no real right *at all to them. At the conclusion of the evidence for the prosecution,

PARKE, B., said, I think that there was too much semblance of a right to claim the sovereigns, to justify our proceeding with the case for the felony; but there remains the assault.

E. Yardley, for the prisoner, submitted, that, as the felonious intent was wholly negatived, the 11th section of the stat. 1 Vict. c. 89, did not apply.

Greaves.—At the last Gloucester Winter Assizes, the same question arose in the case of *Regina v. Pullen*, before Baron *ROLFE*, and there I contended, that the statute only applied where the assault proved was some part of the felony charged; in other words, an assault imbued with the intent to commit felony; but Baron *ROLFE* held against me on that point.

E. Yardley.—At the last Stafford Winter Assizes, Baron *ROLFE* appeared to be of a different opinion.

Greaves cited the cases of *Regina v. Ellis*, 8 C. & P. 654; *Regina v. Guttridge*, 9 C. & P. 471; *Regina v. St. George*, Id. 483; *Regina v. Phelps*, C. & Mar. 180; and *Regina v. Crumpton*, Id. 597.

PARKE, B.—At the last Liverpool Assizes, in a case of robbery, where the jury negatived any intention to commit the robbery, I thought that the prisoner could not be convicted of an assault under the statute 1 Vict. c. 89, s. 11; but that case underwent very little consideration. In the case of *Regina v. Phelps*, the judges were of opinion that the assault was *398] disconnected with the felony charged, and *that the prisoner could only be convicted of an assault connected with the felony charged. There is great difficulty in putting a proper construction on this statute. I will confer with my brother *COLERIDGE* upon it, and perhaps reserve the point for the opinion of the judges. Verdict—Guilty of an assault.

PARKE, B.—I do not think it necessary to reserve the point in this case, as I shall not sentence the prisoner to so long an imprisonment as to render it necessary to take the opinion of the fifteen judges on the matter which has been discussed. There appear to be two constructions of the statute, either of which will authorize a conviction for an assault in this case. The first is, that the statute warrants a conviction for an assault in every case where the felony charged includes an assault. It may have been the intention of the legislature to do away with the distinction that formerly prevailed, that, on an indictment for a felony, the prisoner could not be convicted of a misdemeanor included in such felony; although, in the case of complicated felonies, as murder and burglary, he might be convicted of a lesser felony included in such charges. One ground of the former distinction was, that in felony the prisoner was not entitled to make his full defence by counsel; and therefore, if he was convicted of a misdemeanor, on an indictment for felony, he would have been deprived of the benefit of his counsel's address to the jury. But since the Prisoner's Counsel Act this distinction is done away with: and it may, therefore, have been the intention of the legislature to permit a conviction for an assault, in the case of any felony including an assault. The second construction is, that the statute authorizes a conviction of that assault which is offered in evidence on the part of the prosecution in support of the felony charged. Therefore, *quacunqve viâ*, the prisoner in this case may be convicted of an assault. Another view of the statute has been suggested in a very learned note to a recent edition of Mr. Serjeant Russell's work on the criminal law; (a) but it seems to me that that view of the statute would exclude a large number of cases, such as cutting with intent to do grievous bodily harm; and there are so many instances in which it has been held that the statute applies to such cases, that I think it cannot be so limited. I shall therefore sentence the prisoner, and not reserve the point.

Sentence—One month's imprisonment.

Greaves, for the prosecution.

E. Yardley, for the prisoner.

(a) Mr. Greaves's note on this enactment, 1 Greav., ed. of Russ., C. & M. 782 (f).

REGINA v. MARY ANN MEADOWS.

A., a girl under sixteen, who was in service, was, as she was returning from an errand, asked by B. if she would go to London, as B.'s mother wanted a servant, and would give her £5 wages. A. and B. went away together to Bilston, where both were found, and B. apprehended:—*Held*, that this was not such a *taking* or *causing to be taken* of A. as was sufficient to constitute the offence of abduction under the 20th sect. of the stat. 9 Geo. 4, c. 31.

Señble, that a mere fraudulent decoying or enticement away of a girl under sixteen is not a taking or causing to be taken within that section.

ABDUCTION.—The prisoner was indicted on the 20th sect. of the stat. 9 Geo. 4, c. 31. The first count of the indictment was in the following form:—“The jurors, &c., present, that Mary Ann Meadows, late of the parish of Wolverhampton, in the county of Stafford, single woman, on, &c., with force and arms, at, &c., unlawfully did take and cause to be taken one Caroline Allen † out of the possession and against the will of

Richard Westwood, her father-in-law,† she the said Caroline Allen then and there being an unmarried girl, under the age of sixteen years, *400] "to wit, of the age of thirteen years, against the form of the statute in such case made and provided, and against the peace," &c. Second count, the like, but substituting for the words between the †† the words "out of the possession of and against the will of the said Richard Westwood, the said Richard Westwood then and there having the lawful care and charge of the said Caroline Allen." Third count, like the first, but substituting the words "Ann Westwood, her mother," instead of "Richard Westwood, her father-in-law." Fourth count, the like, but substituting for the words between †† "out of the possession and against the will of Sarah Ann Tombs, she the said Sarah Ann Tombs then and there having the lawful care and charge of the said Caroline Allen." Fifth count, the like, for taking Caroline Allen out of the possession, and against the will of "the said Ann Westwood, her mother, and the said Richard Westwood, her father-in-law." Sixth count, exactly like the fifth, but stating that Richard Westwood had the lawful care and charge of Caroline Allen. Seventh count, for taking Caroline Allen "out of the custody and against the will of Richard Westwood, Ann Westwood, and Sarah Ann Tombs, they the said Richard Westwood, Ann Westwood, and Sarah Ann Tombs then and there having the lawful care and charge of the said Caroline Allen."

It was proved by Caroline Allen that she was in the service of Mrs. Sarah Ann Tombs, at Wolverhampton, and that on the 6th of February, 1844, she had been sent by Mrs. Tombs to the workhouse, where she had got two loaves, and, as she was coming back, she saw the prisoner standing at the door of the house where the prisoner lodged, and that the prisoner, whom she had known before, as they went to school together, asked her if she would go to London, the prisoner stating that her mother wanted a servant, and would give her (Caroline Allen) £5 wages. It was further proved by Caroline Allen, that she then accompanied the prisoner to *401] Bilston, and they there went under *the name of Davis, and proceeded as far as Birmingham, where the prisoner was subsequently taken.

PARKE, B.—I think this will not do; there must be a taking, and from the evidence it appears that the child accompanied the prisoner voluntarily.

Huddleston, for the prosecution, submitted that, as the child was induced to go with the prisoner by the false representation that the prisoner's mother would employ her as a servant, this was a constructive taking within the meaning of the act.

PARKE, B.—It is quite evident that the legislature made a distinction between an offence under the 20th section of the stat. 9 Geo. 4, c. 31, and under the 21st section; (a) and I am inclined to think, that, to bring a case within the 20th section, there must be an actual taking or a causing to be taken away; and a mere decoying or enticement away, which would be an offence within the meaning of the 21st section, would not constitute one under the 20th section. I considered the case before it went before the

(a) The words of the 20th sect. of the stat. 9 Geo. 4, c. 31, as to the abduction of girls under sixteen, are, "if any person shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her;" the words of the 21st sect., as to child-stealing, being "if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of ten years," &c.

grand jury, and then thought there would be a difficulty in it. I have since consulted my Brother COLERIDGE, and he agrees with me that it is not sufficient.

Verdict—Not guilty.(a)

Huddleston, for the prosecution.

(a) See the case of *Regina v. Barratt*, 9 C. & P. 387; and *Regina v. Hopkins*, C. & Mar. 254.

*SHERWIN v. SWINDALL.

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A. went to the house of B., and with a hatchet broke open two doors, and took goods, alleging that he did so to distrain for rent due to his father from C. The jury gave nominal damages, and the trespass being wilful, the judge, at the trial, certified that it was "wilful and malicious," so as to entitle the plaintiff to costs under the stat. 3 & 4 Vict. c. 24, and the Court of Exchequer discharged a rule which was obtained for rescinding that certificate.

The stat. 3 & 4 Vict. c. 24, as to costs in trespass, is to be construed with reference to the stat. 8 & 9 Will. 3, c. 11, s. 4.

TRESPASS for breaking and entering the plaintiff's house, and breaking the doors and taking the plaintiff's goods.—Plea, that, after the trespass and before the commencement of the action, it was agreed between the plaintiff and the defendant that the defendant should repair the doors, and return the goods in satisfaction of the trespasses, and that the defendant did so.—Replication, denying the agreement.

It appeared that the defendant had gone with a hatchet to the house of the plaintiff, who kept the Buffalo beer-house at Newborough, and had broken open two of the doors with it, and had seized a writing-desk and a table as a distress for rent which he alleged to be due to his father from a person named Goode; but that the defendant afterwards returned the goods, and had the doors repaired. It further appeared that the plaintiff had said that she could not make it up with the defendant without her attorney, and that the defendant must go to him, which it did not appear that he had done.

PARKE, B., (in summing up).—The only question is, what damages the defendant ought to pay, in addition to the repairing of the doors and returning the goods, which he has done.

Verdict for the plaintiff, damages £1.

Talfourd, Serjt., applied to the learned baron to certify that the trespass was wilful and malicious, to entitle the plaintiff to costs under the stat. 3 & 4 Vict. c. 24.(a)

PARKE, B.—I am very anxious that the plaintiff should *have [*403 her costs, but I feel some difficulty as to certifying under the present act of parliament that the trespass here was "malicious," though it was certainly "wilful." [His lordship having conferred with COLERIDGE, J., said] We think that the recent act of Parliament ought to be construed with reference to the statute of William,(b) and under that statute it was always held that a plaintiff was entitled to full costs where the defendant committed the trespass after notice. This was a complete

(a) See the cases of *Foster v. Pointer*, 9 C. & P. 718; and *Tebbutt v. Holt*, ante, p. 280.

(b) The stat. 8 & 9 Will. 3, c. 11, s. 4, by which it was enacted, that, in all actions of trespass in which the judge certified that the trespass was "wilful and malicious," the plaintiff should recover his full costs of suit.

wilful trespass, and I shall give a certificate; but if the case does not warrant such a certificate as I shall give, Mr. *Whateley*, may move the court above.

Certificate granted.(a)

Talfourd, Serjt., and *Meleyard*, for the plaintiff.

Whateley and *F. V. Lee*, for the defendant.

In the ensuing term, *Whateley* applied to the Court of Exchequer, and obtained a rule to show cause why the certificate of the learned baron should not be rescinded, which rule was, after argument, discharged.

(a) The certificate was in the following form:—"I certify that the trespass for which this action was brought was wilful and malicious. Dated this 12th day of May, 1844. (signed) J. Parke."

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*HAWTHORN v. HAMMOND.

A person who keeps a public inn is bound to admit all persons who apply peaceably to be admitted as guests.

A declaration against an innkeeper stated, that the defendant kept an inn, and that the plaintiff, at night, was travelling, and the inn being shut up, the plaintiff knocked at the door of the inn, in order that he should be admitted as a guest, and that, although the defendant heard the knocking, and had notice of the premises, she would not admit the plaintiff into the inn. The defendant pleaded that she did not hear the knocking, and had not notice of the premises:—*Held*, that, on this issue, it was for the jury to say, whether the defendant heard the knocking, and if so, whether the defendant ought to have concluded from it that the person so knocking at the door was a person requiring to be admitted as a guest.

CASE against the defendant, as an innkeeper, for not receiving the plaintiff as a guest.(a) The declaration stated that the defendant kept an inn, and that the plaintiff, who was travelling in a certain carriage, went to the

(a) The declaration and second and third pleas were in the following form:—"For that, whereas the defendant, before and at the time of the committing of the grievance hereinafter mentioned, was an innkeeper, and did keep a certain common inn for the reception and accommodation of travellers, that is to say, a certain common inn called the Wheel Inn, together with a certain stable near to the said inn for the reception, lodging, and accommodation of the horses of, and used in travelling to the said inn by, travellers, and persons lodged and accommodated in the said inn as guests therein of the defendant as such innkeeper as aforesaid, and which said inn and stable were situate in the county of Salop. And the plaintiff further says, that, whilst the defendant was such innkeeper, and so kept the said inn and stable as aforesaid, to wit, on the 17th day of May, A. D. 1843, and in the night-time of that day, to wit, at ten of the clock in the night of that day, the plaintiff then being a traveller, and then being and travelling in a certain carriage, then drawn by a certain horse, then driven and used by the plaintiff in that behalf, arrived at and went to the said inn; and that the plaintiff then went to a certain outer door of the said inn, such outer door then being a usual and proper door of entrance into the said inn for travellers and other persons, and then also being shut, closed, barred, and fastened, so that the plaintiff could not open the same, or go or enter at the same into the said inn; and thereupon the plaintiff then knocked and rapped at and struck the said door, in order to, and did thereby, make a loud noise at the said door, with intent and in order that such noise should and might be, and the same then accordingly was, heard by the defendant and her servants then being in the said inn, and also with intent and in order that the defendant, then being in the said inn, should and might then open the said door, and suffer and permit the plaintiff to enter into, and to stay, lodge, and be accommodated in the said inn for and during the said night, and also suffer and permit the said horse then to be taken and led into, and remain and be fed and taken care of in, the said stable for and during the said night, and the plaintiff thereby then required the defendant to open the said door, and to suffer and permit the plaintiff to enter into, and to stay, lodge, and be accommodated in, the said inn, and also to suffer and permit the said horse to be taken and led into, and remain and be fed and taken care of in, the said stable; and the plaintiff was then ready and willing to pay to the defendant a reasonable sum of money for such lodging and accommodation for himself, the plaintiff, and also for the said horse being taken and led into, and remaining

*defendant's inn at ten o'clock on the night of the 17th of May, 1843, and, the outer door of the inn being fastened, *the plaintiff knocked and made a noise, in order that he should be admitted as a guest, and that the plaintiff would have tendered a reasonable sum for his accommodation, but could not see or hear any proper person to whom to offer payment; and that, although the defendant heard the plaintiff knocking for the purpose aforesaid, and had notice of the premises aforesaid, and although there was sufficient time for the defendant and her servants to have admitted the plaintiff, and sufficient room in the inn for his accommodation, yet the defendant would not admit the *plaintiff into the inn; by means whereof the plaintiff was put to trouble, inconvenience, and expense. [405]

and being fed and taken care of in, the said stable as aforesaid; and the plaintiff was then also ready and willing to have and would have tendered and offered to the defendant to pay her such reasonable sum of money as aforesaid; but the plaintiff, whilst he was at the said inn as aforesaid, neither did nor could see or hear either the defendant or any other proper person in that behalf to whom he, the plaintiff, could or might or ought to have tendered or offered to pay the same, whereby he the plaintiff was altogether hindered and prevented from tendering or offering to pay the same, as, but for the premises, he would have done; and although the defendant then, and whilst the plaintiff was at the said inn as aforesaid, and knocking and rapping at and striking the said door as aforesaid, and making such noise as aforesaid, with the intent and for the purpose in that behalf aforesaid, to wit, on the day and year aforesaid, heard the said knocking, rapping, striking, and noise, and had notice of all and every the facts, matters, and premises aforesaid; and although there was then full and sufficient time for the defendant and her said servants to have opened the said door, and to have admitted the plaintiff into the said inn, whilst he the plaintiff so was and remained at the said door, and there was also then sufficient room in the said inn for the lodging, accommodation, and entertainment of the plaintiff therein, and there was then also sufficient room in the said stable for the accommodation, feeding, keeping, and taking care of the said horse therein: yet the defendant, not regarding her duty as such innkeeper as aforesaid, but contriving, and wrongfully and unjustly intending, to injure the plaintiff, and to put him to great trouble and expense, annoyance, distress, and inconvenience, did not nor would, when or at any time whilst the plaintiff was at the said inn as aforesaid, and was endeavouring to obtain admission therein as aforesaid, open the said door, or suffer or permit the plaintiff to enter into or be accommodated in the said inn, or suffer or permit the said horse to go or be taken or led into, or to be fed or taken care of in, the said stable, but wholly refused and neglected so to do; and, on the contrary thereof, then kept and continued the said door shut, closed, barred, and fastened as aforesaid; and also kept the windows of the said inn closed, and wholly neglected and refused to, and did not in any manner whatever, give answer to, speak to, or notice the plaintiff when or at the time whilst he was at the said inn as aforesaid, or the said knocking and rapping at and striking the said door, or the said noise so made as aforesaid; by means whereof the plaintiff was forced and obliged to, and necessarily did, quit and go away from the said inn, and in the said carriage, drawn by the said horse, go and travel in the night-time divers, to wit, fifteen miles, in order to procure elsewhere lodging and refreshment and accommodation for himself and the said horse; and, by means of the premises, the plaintiff was put to great trouble, inconvenience, and expense of his moneys, and was delayed in his journey, and was necessarily obliged to expend, and did expend, a large sum, to wit, £5, in and about the additional hire of the said horse and carriage; and otherwise, by means of the premises, the plaintiff hath been and is greatly annoyed, distressed, injured, and damaged, to the plaintiff's damage of £20; and thereupon he brings suit," &c.

Second Plea.—And for a further plea in this behalf, the defendant saith, that she did not hear the said knocking, rapping, striking, or noise in the declaration mentioned, nor had she notice of any of the said facts, matters, or premises in the declaration mentioned, in manner and form as the plaintiff hath in his said declaration in that behalf alleged; and of this she puts herself upon the country, &c.

Third Plea.—And for a further plea in this behalf, the defendant saith, that there was not at the said time when, &c., in the declaration mentioned, sufficient room in the said inn for the lodging, accommodation, or entertainment of the plaintiff therein, nor sufficient room in the said stable for the accommodation, feeding, keeping, or taking care of the said horse therein, in manner and form as in the said declaration is in that behalf alleged; and of this the defendant puts herself upon the country, &c.

Pleas:—1st, not guilty; 2d, that the defendant did not hear the knocking in the declaration mentioned, nor had she notice of any of the premises in the declaration mentioned, (concluding to the country;) 3d, that there was not room in the inn for the plaintiff's accommodation, (concluding to the country.)

It appeared that the defendant kept the Wheel Inn at Worfield, which is on the road between Bridgenorth and Kidderminster, and that, on the 17th of May, 1843, the plaintiff and his brother arrived in a gig at the defendant's inn at between nine and ten o'clock at night, and that the inn was shut up, and that the plaintiff's brother got out of the gig, and knocked with his fist, and kicked with his foot, at the door of the inn for ten minutes or a quarter of an hour, but without being able to obtain admission; and that the plaintiff and his brother then went away, and tried to obtain accommodation at a beer-house, but that being full, they returned again to the defendant's inn, and again knocked, without being able to obtain admission; in consequence of which they were obliged to go on to Bridge-north.

PARKE, B., (in summing up.)—There is no doubt that the law is, that a person who keeps a public inn is bound to admit all persons who apply peaceably to be admitted as guests. You will therefore have to say whether you are satisfied that the noise made by the plaintiff's brother was really heard by the defendant; and if so, whether you think that she ought to have concluded from it that the persons so knocking at the door were persons requiring to be admitted as guests, or whether she might have concluded that they were drunken persons, who had come there to make a disturbance. You will take the case into your consideration, and find, by your verdict, whether you think that the noise made at the door implied *408] that the *persons who made it wanted to be admitted as guests or not.

Verdict for the plaintiff on the first and third issues, and for the defendant on the second issue.(a)

Whateley and *Whitmore*, for the plaintiff.

Talfourd, Serjt., and *Godson*, for the defendant.

(a) See the case of *Rez v. Ivens*, 7 C. & P. 213; and the form of an indictment against an innkeeper for not receiving a guest, *Id.* 213, n. (a).

DUMELOW v. LEES.

By the stat. 48 Geo. 3, c. cx. (loc. and pers.,) a commissioner of the Court of Request at Wednesbury is liable to a penalty of 50*l.* if he acts without having a qualification of 50*l.* a year in real property, or 1500*l.* in personals, or 25*l.* a year real and 1000*l.* personal property, "above all charges and incumbrances whatsoever," the proof of which qualification is, by that statute, to lie on him in any action against him for the penalty:—*Held*, that the words "above all charges and incumbrances whatsoever" do not mean beyond payment of all his debts, but only apply to specific charges on the property in respect of which he claims to be qualified. *Held*, also, that, in such actions, it is sufficient if the defendant shows that he has property to the required amount, and that it is not incumbent on him to give any evidence with a view of showing that the property is not encumbered.

DEBT on the stat. 48 Geo. 3, c. cx. (loc. and pers.,) for a penalty of 50*l.*, alleged to have been incurred by the defendant, by his having acted

as a commissioner in the Court of Request at Wednesbury, without being duly qualified under that act.(b)—Plea, nil debet, “by statute.”

*It was opened by *Godson*, for the plaintiff, that, by the stat. 48 Geo. 3, [c. cx. (loc. and pers.), which was entitled, “An Act for the more easy and speedy recovery of small Debts within the township of Wolverhampton, and the several parishes and places therein mentioned, in the county of Stafford,” commissioners were appointed to hear and determine plaints concerning such debts in a summary way, in two separate and distinct jurisdictions; “one jurisdiction to extend to the townships of Wolverhampton and Wednesfield, and the several parishes of Brewood, Patterham, Bushbury, and Penn; and the other jurisdiction to extend to the several townships of Bilston and Willenhall, and the parishes of Wednesbury and Darlastone, except the manor of Bradley, in the said township of “Bilston.” The style of the latter court being, “The Court of Request for the townships of Bilston and Willenhall, and the Parishes of Wednesbury and Darlastone, in the county of Stafford.” By sect. 7 of that act, it is enacted, “That no person shall be qualified to act as a commissioner in the execution of this act, unless he shall at the time of acting be a householder, and possessed of a real estate of the clear annual value of 50*l.*, or of personal estate of the value of 1500*l.*, or of a real estate of the clear annual value of 25*l.*, together with a personal estate of the value of 1000*l.*, above all charges and incumbrances whatsoever; and if any person not being so qualified shall presume to act as a commissioner, every such person shall, for every such offence, (over and above any punishment he may be subject and liable to for wilful and corrupt perjury,) forfeit and pay the sum of 50*l.*, together with full costs of suit, to any person or persons who shall sue for the same in any of his majesty’s Courts of Record at Westminster, by action of debt or on the case, or by

(b) The declaration was in the following form:—“For that whereas the defendant, after the passing of a certain act of Parliament, made and passed in the forty-eighth year of the reign of his late majesty King George the Third, entitled, [it here set out the title of the stat. 48 Geo. 3, c. cx. (loc. and pers.)] and before the commencement of this suit, to wit, on the 7th day of November, A. D. 1842, in the county of Stafford, did presume to act and did act as a commissioner in the execution of the said act, that is to say, in the hearing and determining of a certain cause depending in the Court of Request for the townships of Bilston and Willenhall, and the parishes of Wednesbury and Darlastone, in the county of Stafford, constituted and established under and by virtue of the said act, in which cause one Simeon Constable was plaintiff, and one John Westley was defendant, and in then making a certain order in the said cause, whereby it was ordered by the said court, amongst other things, that the said John Westley should pay to the clerk of that court, at his office, in Bilston, for the use of the said Simeon Constable, 1*l.* debt, and 7*s.* 1*d.* costs, in manner therein mentioned, he the defendant, at the time of his so acting, not being a householder, and not being then possessed of a real estate of the clear annual value of 50*l.*, or of a personal estate of the value of 1500*l.*, or of a real estate of the clear annual value of 25*l.*, together with a personal estate of the value of 1000*l.*, above all charges and incumbrances whatsoever, contrary to the form of the statute in such case made and provided, whereby and by force of the said statute the defendant forfeited for his said offence the said sum of 50*l.*, and thereby and by force of the said statute an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of 50*l.*, being the said sum above demanded; yet the defendant hath not paid the said sum above demanded, or any part thereof, but hath hitherto wholly refused and still doth refuse so to do, and thereupon the plaintiff brings his suit,” &c.

In the case of *Fife v. Bousfield*, E. T. 1844, it was held by the Court of Queen’s Bench, that, in an action for any penalty or forfeiture, the declaration must conclude “against the form of the statute,” and that, if it does not do so, it is bad even after verdict; but that, where the penalty or forfeiture is by the statute to be sued for by the party grieved, the venue is not restricted to the proper county by the stat. 21 Jac. 1, c. 4.

bill, plaint, or information, wherein no essoign, protection, wager of law or more than one imparlance shall be allowed; and in every such action, bill, plaint, or information, the proof of such qualification shall be on the defendant; and it shall be sufficient for the plaintiff or prosecutor to prove, that the person so sued or prosecuted had acted as a commissioner in the execution of this act: "Provided nevertheless, that all judgments, orders, decrees, acts, and proceedings of all and every person and persons acting as a commissioner or commissioners in the execution of this act, though not duly qualified as aforesaid, previous to his or their being convicted of such offence, shall, notwithstanding such conviction, be as good, valid, and effectual, as if such person or persons had been duly qualified according to the directions of this act." It would be distinctly shown that the defendant had, on the 7th of November, 1843, acted as a commissioner at the Court of Request at Wednesbury, in a case of *Simeon Constable* against *411] *John Westley*; and although, by the "act, the proof of qualification lay on the defendant, he should, in anticipation of the defence, give some evidence to show that the defendant was not duly qualified to act as a commissioner.

It was proved, by a witness named Topham, that, on the 7th of November, 1843, the defendant was at the Court of Request, at Wednesbury, and sat with the commissioners, and acted as their chairman, on the hearing of a case of *Constable v. Westley*; and Mr. Wilton, the clerk of Mr. Willim, the clerk of the Court of Request, produced the book of the proceedings of the court, in which there was an entry of the case of *Constable v. Westley*, and an order of the court for Westley to pay to the clerk of the court, for the use of Constable, 1*l.* debt, and 7*s.* 1*d.* costs; and the entries of the proceedings of the court on that day were signed by the present defendant, as chairman.^(a) With a view of disproving the defendant's qualification, Mr. Kenrick, who had been a partner with the defendant as a coach-smith and spring maker, was called; and he stated, that the defendant had private property of his own, consisting of real estate, which he inherited from his father, worth more than 25*l.* a year; that his house had costly furniture; and that, in their partnership, the defendant had two-thirds of *412] "the stock in trade, which, in the year 1827, was worth 6000*l.*, and was increased in the year 1842; but, in consequence of some differences, their partnership affairs were the subject of a suit in Chancery.

PARKE, B.—By this act of Parliament, a commissioner is to have a qualification of 50*l.* a year real estate, or 1500*l.* personal property, or 25*l.* a year real estate, and 1000*l.* in personalty. Clear yearly value of an estate means, its value above all taxes and charges on the estate.

Godson.—As the debts of a trader as much affect his real as his personal

(a) By sect. 14 of the stat. 48 Geo. 3, c. cx. (loc. and pers.) it is enacted, "That the said respective commissioners shall, and they are hereby required to make or cause to be made fair and regular entries in a book or books, to be provided by them for that purpose, of all the judgments, acts, orders, directions, regulations, and proceedings of them the said respective commissioners, relative to the execution of the several powers and authorities vested in them by this act, and also of the names of the commissioners who shall be present at their respective meetings; and such entries shall be signed by the chairman of each respective meeting, and such entries, when so signed, and such book and books shall be allowed to be read in evidence in proof of the proceedings of such respective courts in all courts whatsoever." And by sect. 53 of the same statute it is enacted, "That this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices and others, without being specially pleaded."

estate, I propose to ask Mr. Kenrick, whether the bills of the firm have not been dishonoured.

PARKE, B.—If the defendant, when he acted as a commissioner, had a real estate of 50*l.* a year, or a personal estate of 1500*l.* value, or a real estate of 25*l.* a year and personal estate of 1000*l.*, I am of opinion that he is qualified to act as a commissioner, even if he was insolvent at the time. It seems to me that the legislature has not provided for that case, by not saying, “over and above the payment of his just debts.” If it should become necessary, I would reserve the point. You may ask whether the partnership was in debt, unless you call on me to decide the point here.

Godson.—I propose to ask Mr. Kenrick, whether bills of the firm had not been dishonoured in the year 1842.

Talfourd, Serjt., for the defendant, objected to this question, unless the bills were produced.

PARKE, B.—I think the question cannot be put without production of the bills.

The question was not put.

*Godson proposed to ask, whether, in the year 1842, the firm had not been sued for partnership debts. [*413]

Talfourd, Serjt.—That cannot be asked without production of the writ by which the firm was sued.

PARKE, B.—You cannot ask that.

The question was not put.

Mr. Kenrick further stated, that he had never heard from the defendant that there was any mortgage on his property, nor that he had ever granted any annuity on it; and Mr. Kenrick also said, that, if he were offered 1800*l.* for his one-third share of the partnership property, he should be sorry to take it.

PARKE, B., (to the jury.)—It is not disputed that the defendant is a householder; and, if you believe the last witness, there is complete proof that he is qualified. Verdict for the defendant.

Godson and Carrington, for the plaintiff.

Talfourd, Serjt., and W. J. Alexander, for the defendant.

COURT OF QUEEN'S BENCH.

BEFORE LORD DENMAN, C. J., PATTESON, J., AND WIGHTMAN, J.

Godson applied for a new trial, on the ground that, by the stat. 48 Geo. 3, c. cx. s. 7, the proof of qualification lay on the defendant, and that, although the witness that *had been called on the part of the plaintiff to disprove the defendant's qualification had not done so, it still [*414] lay on the defendant, not only to prove that he had property to the required amount, but that it was “above all charges and encumbrances,” which word “charges,” as he submitted, included debts.

LORD DENMAN, C. J.—The word “charges” would mean mortgages, and the like.

Godson.—There should have been some proof on the part of the defendant, to show his property unencumbered. By the act of Parliament the onus probandi is thrown on him.

LORD DENMAN, C. J.—If the defendant had no debts, how could he prove that?

WIGHTMAN, J.—Debts are not a charge or encumbrance. That is my difficulty.

Lord DENMAN, C. J.—How would you reckon debts due to him?

Godson.—I submit, that, on the 7th section of the act of Parliament, an onus is thrown on the defendant of showing that he had property of the required amount, and that it is not covered by charges or encumbrances.

Lord DENMAN, C. J.—We think that the opinion of the learned judge at the trial was right. The words “above all charges and encumbrances whatsoever” are an intelligible phrase, meaning specific charges on the property in question. How can a defendant prove that there are none?

PATTESON, J.—The onus on the defendant is to show that he has property to the required amount. Rule refused.

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*(*Crown Side.*)

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. PETER STANTON.

On an indictment for an assault, with intent to commit a rape, the prosecutrix stated, that the defendant, her medical man, being in her bed-room, directed her to lean forward on a bed, that he might apply an injection; she did so, and the injection having been applied, she found the defendant was proceeding to have a criminal connection with her, upon which she instantly raised herself up, and ran out of the room. She stated that the defendant had penetrated her person “a little”:—*Held*, that if it had appeared that the defendant had intended to have had a criminal connection with the prosecutrix by force, the complete offence of rape would, upon this evidence, have been proved, but that the thus getting possession of the person of the woman by surprise was not an assault with intent to commit a rape, but was an assault.

ASSAULT, with intent to commit a rape.—The first count of the indictment charged the defendant with assaulting Emma Brown, on the 24th of February, 1844, with intent to ravish her. Second count, for a common assault.

The prosecutrix, Emma Brown, stated, “I am the wife of William Brown. The defendant was our medical attendant for fifteen months. He attended me for bleeding piles.—He wished me to go with him to Birmingham to consult another medical man, Mr. Ingleby. I went with him on the 15th of February, 1844, to Mr. Ingleby. After that the defendant said he must give me an injection. On the 24th of February, the defendant came to our house at ten o'clock at night. I went up stairs to my own bedroom, and the defendant went up with me: there was a light in the room. He said he was ordered to give this injection, and he said I must place my head on the bed, and my feet on the floor, and I did so, and my clothes were up over my back. He was in the room behind me, and he then began to use the injection, and I felt the water running cold on my legs. This lasted five minutes. I was going to raise myself up, and he said, ‘Put your head on the bed, and do not stir for a moment.’ I have had injections before, and they do keep persons still for a little while after they are applied. As I lay I perceived something very warm against my person; I resisted, and rose up from the bed and said, ‘Doctor, what *416] do you mean?’ His small-clothes were quite open, and I saw his naked person. I then ran down stairs and fell on a chair, and he rushed out of the house. I felt the parts of the defendant enter mine just a little.

COLERIDGE, J.—If there was force the full crime was complete.

The prosecutrix further stated that she complained to her husband the same evening; but it appeared that neither she nor her husband went before any magistrate till the 5th of March.

Whitmore addressed the jury for the defendant, and contended that the whole charge was entirely unfounded.

COLERIDGE, J., (in summing up.)—An assault with intent to commit a rape is very different from an assault with intent to have an improper connection. The former is with intent to have a connection by force; but here, according to the statement of the prosecutrix, the defendant desists the moment she resists, and at the most it could only be an attempt by surprise to get possession of the person of the prosecutrix,^(a) and that is not an assault with intent to commit a rape, but is an assault. If in this case the defendant had intended to have effected his purpose by force, the complete offence of rape would have been proved, as the prosecutrix states that the defendant penetrated her person; and as the smallest penetration is sufficient to constitute the complete offence of rape,^(b) the defendant would, if force had been proved to have been used, have been entitled to be acquitted on this indictment, on the ground *that the felony [^{*417} had been proved against him; but another important question is, whether the defendant committed any assault at all on the prosecutrix.

Verdict—Not guilty.

Allen and Woolrich, for the prosecution.

Whitmore, for the defendant.

(a) See the cases of *Regina v. Saunders*, 8 C. & P. 265; and *Regina v. Williams*, *Id.* 286.

(b) See the case of *Regina v. Lines*, *ante*, p. 393.

SHROPSHIRE ASSIZES.

(*Crown Side.*)

BEFORE BARON PARKE.

REGINA v. WILLIAM MOLE.

A. picked up the purse of B., which contained money, on a turnpike-road along which B. had previously travelled by coach. A. converted the purse and its contents to his own use:—*Held*, no larceny, and that A. was liable civilly, but not criminally. If there had been any mark on the purse by which the owner could have been known, it would have been otherwise.

LARCENY.—The prisoner was indicted for stealing, on the 10th of January, 1844, a purse, and three sovereigns, and eighteen shillings, the property of Thomas Weaver, at the parish of Cleobury Mortimer.

It appeared that the wife of the prosecutor had lost the purse containing the money as she was proceeding by the coach from Cleobury Mortimer to Bewdley, and that when she asked the prisoner if he had picked up a purse with some money, and her husband said to the prisoner that he would give him a sovereign if he would give him the money, the prisoner said he had never had the luck to pick up a purse. Another witness proved that the prisoner came to his house on the 12th of January, and

said that he had found a purse with some money in it at the bottom of
 *418] Hungry Hill-bank, which is on the *turnpike-road, and a coach
 going from Cleobury Mortimer to Bewdley would pass by the place.
 He said that he found it on the Wednesday before, (the 10th,) and that a
 broad wheel had gone over it, and he kicked it with his foot, and turned
 back and saw that it was a purse with some money; and on this, witness
 asking him, on the Friday after, what sort of a purse it was, the prisoner
 said it was a greenish-like sort of a knit purse, with a clasp at the top,
 and that he took care to throw the purse away where it should not be
 found; and that he gave his wife 30s., and she bought some bricks with
 part of it, and he laid out near 12s. on a mare that he had that was bad.—
 Another witness said, “I told the prisoner that I had heard that he (the
 prisoner) had found some money, and the prisoner then told me to sit
 down, and he would tell me the truth. I sat down, and he told me that
 he was going to Cleobury on the Wednesday morning before, and he
 picked up a purse, and he looked in it, and there were three sovereigns
 and eighteen shillings in it, and he said he shot it into his hand, and flung
 the purse away. He said there was a person with him, but he did not
 see him pick up the purse.”

PARKE, B.—There is no mark on the purse, and no owner known.
 There is no doubt that the prisoner intended to apply it to his own use,
 but that per se does not make him a thief.

Huddleston, for the prosecution, cited the case of *Regina v. Peters*,
 ante, p. 245.(a)

PARKE, B.—This purse is found in a place where it might reasonably be
 presumed that the owner did not know where it would be found, and
 where the person owning it did not know where to find it; and I think
 that a person taking property under the circumstances proved in this case
 *419] is not *liable criminally, though he is civilly, and I take the law
 to be that the prisoner is not guilty of a felony, though he did take
 this property with an intent to convert it to his own use. My impression
 upon the subject is, that this is a case of pure finding. There is, no doubt,
 a qualification of the rule, if there is a mark on the property by which
 the owner can be known. Verdict—Not guilty.

Huddleston, for the prosecution.

(a) And see, also, Greav. ed. of *Russ. C. & M.*, vol. 2, p. 11 et seq., where the author-
 ities on this subject are collected.

HEREFORD ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. CHARLES LEWIS.

On an indictment for manslaughter by beating, it appeared that the deceased had died
 of a dislocation of the vertebrae two days after fighting with the prisoner:—*Held*, that,
 if the jury were not satisfied that the death of the deceased was caused by the pri-
 soner, they might find the prisoner guilty of an assault under the stat. 1 Vict. c. 85,

and that, with a view to a conviction on that statute, it was immaterial that the deceased was the challenger in the fight, and that it did not appear which party struck the first blow.

If two parties go out to strike one another, and do so, it is an assault in both, and it is quite immaterial which strikes the first blow.

MANSLAUGHTER.—The prisoner was indicted for manslaughter, in killing John Preece, by striking and beating him and casting him on the ground.

It appeared that the prisoner and deceased, and a number of other persons, were at a dance at the Boat public-house at Byford, on the night of Saturday the 31st of July, 1843, and that the dance having lasted till after twelve o'clock on that night, the deceased challenged the prisoner to fight him, which the prisoner declined doing; upon *which the deceased [*420 took off his braces, and, having strapped them round him, went out of the house. The prisoner did not follow him, and he came back, and again challenged the prisoner, and a fight took place between them. How it commenced did not appear; but, after some blows on both sides, the prisoner and deceased wrestled, and both fell, the deceased undermost. The deceased could not get up, and could fight no more, and he complained of his neck and bowels. It further appeared that he died on the following Monday morning, and that, on a post-mortem examination of his body, the vessels of the brain were found to be gorged with blood, and two of the vertebrae of his neck dislocated, which was the cause of his death, and it was proved that this might have been occasioned by a fall.

Barrett addressed the jury for the prisoner, and submitted, that there was no sufficient evidence to show that the death of the deceased was caused by any act of the prisoner.

COLERIDGE, J.—*Mr. Barrett*, what do you say as to the assault?

Barrett.—The prisoner was not the challenger.

COLERIDGE, J.—That is not material.

Barrett.—There is also no evidence that the prisoner struck the first blow.

COLERIDGE, J.—If both these parties went out to strike one another, and did so, it is an assault in both. It is quite immaterial which struck the first blow, as no blow can be justified, unless it be given in self-defence.

Barrett.—I cannot carry it further than that the deceased was certainly the challenger, and that it does not appear that he did not strike the first blow.

***COLERIDGE, J.**, (in summing up.)—With respect to the charge [*421 of manslaughter, you will have to say whether you are satisfied that the prisoner occasioned the fall from which the death of the deceased took place. If you are not satisfied, by the evidence, that he did, you will then have to say whether the prisoner is guilty of an assault; for whenever a charge of felony includes an assault, and the jury think that the felony is not made out, the party may be convicted of an assault.(a) *Mr. Barrett*, on the part of the prisoner, put the case as if a person could not be guilty of an assault unless he struck the first blow. But that is not so, as no one is justified in striking another, except it be in self-defence; and it ought to be known, that, whenever two persons go out to strike each other, and do so, each is guilty of an assault.

Verdict—Not guilty.

Greaves, for the prosecution.

Barrett, for the prisoner.

(a) Under the stat. 1 Vict. c. 85, s. 11, see the case of *Regina v. Boden*, ante, p. 395.

REGINA v. JAMES CLARKE.

An indictment for burglary charged the prisoner with breaking, in the night-time, into the dwelling-house of E. B., "with intent *the goods and chattels in the same dwelling-house* then and there being feloniously and burglariously to steal, and stealing the goods of E. B." It was proved that the house was that of E. B., but that the goods the prisoner stole were the joint property of E. B. and two others:—*Held*, that, if it was proved that the prisoner broke into the house of E. B. with intent to steal the goods there generally, that would be sufficient to sustain the charge of burglary contained in the indictment, without proof of an intent to steal the goods of the particular person whose goods the indictment charged that he did steal.

BURGLARY.—The first count of the indictment charged that the prisoner, on, &c., at, &c., in the night-time, "the dwelling-house of one Elizabeth Bird, there situate, feloniously and burglariously did break and enter, with *422] intent the goods and chattels in the same dwelling-house then *and there being feloniously and burglariously to steal, take, and carry away," and then and there feloniously stealing five taps, and a quantity of wine, beer, cider, and candles, of the goods and chattels of the said Elizabeth Bird. The second count was exactly similar, but charged a breaking of the dwelling-house of Elizabeth Bird *and others*, and laid the property stolen to be in Elizabeth Bird *and others*.

It appeared from the evidence that the house in question was broken into on the night of the 13th of January, 1844, and the goods mentioned in the indictment stolen; and it appeared that Miss Elizabeth Bird was the sole tenant of the house, but that she and two other ladies lived in it in common, each of the three contributing an equal amount to the establishment, and that the articles stolen had been purchased by Miss Bird, but that, at the end of the year, they would be paid for by the three ladies when they divided the expenses of the establishment.

W. H. Cooke, for the prisoners, objected that neither of the counts of the indictment was proved, as the evidence showed that the house of Miss Bird was broken and the goods of the three ladies stolen.

E. Yardley, for the prosecution.—I submit, that the goods having been purchased by Miss Bird, and credit having been given to her exclusively for them, they are properly described as her goods, although they were bought for the joint use of the three ladies, and eventually to be paid for by them jointly; but, even assuming the contrary, I submit that the first count is sufficiently proved, by showing that the prisoner broke and entered the house of Miss Bird in the night-time with intent to steal goods there, without proof that his intent was to steal the goods of the particular person which that count charges him with stealing. (a)

*423] **COLERIDGE, J.*, (having conferred with *PARKE, B.*)—We think, that, to support the first count of this indictment, it is sufficient to prove that the prisoner broke and entered the house of Miss Bird in the night-time with intent to steal the goods there generally; and that, by the evidence given in this case, the first count of the indictment is proved.

Verdict—Guilty on the first count.

E. Yardley, for the prosecution.

W. H. Cooke, for the prisoner.

(a) See the case of *Regina v. Lawes*, ante, p. 62.

GLOUCESTER ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. FRANCES SMITH.

On the trial of an indictment for larceny as a servant, it appeared that the prisoner lived in the house of the prosecutor, and acted as the nurse to his sick daughter, the prisoner having board and lodging and occasional presents for her services, but no wages. While the prisoner was so residing, the prosecutor's wife gave the prisoner money to pay a coal bill, which money the prisoner kept, and brought back a forged receipt to the coal bill:—*Held*, that the prisoner was not the servant of the prosecutor, but that this was a larceny of the money.

LARCENY.—The prisoner was indicted, as the servant of Richard Boyce Osborne, for stealing a sovereign and a half-sovereign, the property of Richard Boyce Osborne, her master.

It appeared that the prisoner lived in the house of the prosecutor, and acted as the nurse to his sick daughter, and that the prisoner had board and lodging in the house, but no wages, Mrs. Osborne, the wife of the prosecutor, occasionally making her presents of money as a reward for her services. While the prisoner was so residing, Mrs. Osborne gave her a sovereign and a half-sovereign to pay a coal bill, amounting to 1*l.* 5*s.* 6*d.* This the prisoner never paid, but kept the sovereign and the half-sovereign, and brought Mrs. Osborne the bill with a forged receipt on it, and gave her four shillings and sixpence as the change. [*424]

With respect to the larceny, *Francillon*, for the prosecution, cited *Lavender's case*, 2 Greav. ed. of Russ. C. & M. 160; *Regina v. Goode*, C. & Mar. 582; and *Regina v. Beaman*, Id. 595.

COLERIDGE, J.—I think that the prisoner was not a servant of the prosecutor; but that there is evidence of the larceny.

Verdict—Guilty of the larceny.

Francillon, for the prosecution.

*CENTRAL CRIMINAL COURT. [*425]

FEBRUARY SESSION, 1844.

BEFORE MR. JUSTICE COLERIDGE AND MR. JUSTICE CRESSWELL.

REGINA v. THOMAS DUNNETT.

In an indictment against the master of a merchant ship, on the stat. 5 & 6 Will. 4, c. 19, for wilfully and wrongfully leaving a seaman behind before the termination of the voyage for which he was shipped, the allegation of ownership is a material allegation, and must be proved as laid; and the only defence which the master can set up

is, the production of a certificate of the consul or other party mentioned in the statute, or proof that it was impossible to obtain such certificate.

THE first count of the indictment in substance charged the defendant, that he, on the 8th October, 1843, in parts beyond the seas, at a place out of her majesty's dominions, to wit, at Bahia, in South America, was *master of a certain merchant ship* called the "*Sarah Charlotte*," *belonging to a certain subject of the United Kingdom* of Great Britain and Ireland, that is to say, to one James Howard; and that one Edward Wilkinson and one Hiram Gibbs were *persons belonging to the crew* and on board the ship, duly engaged by the defendant to serve on a voyage, which was not then completed, from Guayaquill, in Colombia, to Vigo, in Spain, but not forming part of the original crew; and that one Edward Porter, Esq., was her majesty's consul at Bahia; and that the defendant, well knowing the premises, at Bahia aforesaid, *unlawfully, wilfully, and wrongfully, did leave them behind on shore before the completion of their voyage, on the plea that they were not in a condition to proceed on the voyage, he not having obtained a previous certificate in writing of the said consul, or of any such functionary, of their not being in such condition, there being time to obtain such* *426] *certificate, against the statute, (a) &c.* The count concluded with "an allegation that the defendant, on the 20th January, 1844, was found

(a) The stat. 5 & 6 Will. 4, c. 19, s. 40, after reciting that "great mischiefs have arisen from masters of merchant ships leaving seamen in foreign parts, who have been thus reduced to distress, and thereby tempted to become pirates, or otherwise misconduct themselves, and it is expedient to amend and enlarge the law in this behalf," enacts, "That, if any master of a ship *belonging to any subject of the United Kingdom* shall force on shore and leave behind, or shall otherwise *wilfully and wrongfully leave behind, on shore or at sea, in any place in or out of his majesty's dominions, any person belonging to his crew, before the return to or arrival of such ship in the United Kingdom, or before the completion of the voyage or voyages for which such person shall have been engaged, whether such person shall have formed part of the original crew or not, every person so offending shall be deemed guilty of a misdemeanour, and shall suffer such punishment, by fine or imprisonment, or both, as to the court before which he shall be convicted shall seem meet,*" &c.

The 41st sect. of the same statute enacts, "That no such master shall discharge any individual person of his crew, whether British subject or foreigner, at any of his majesty's colonies or plantations, without the previous sanction in writing of the governor, lieutenant-governor, secretary, or other officer appointed in that behalf by the government there, or, in the absence of all such authorities at or near to the port or place at which the ship shall be then lying, then of the chief officer of customs of such colony or plantation, resident at or near to such port or place; nor shall he discharge any such person at any other place abroad, *without the like previous sanction in writing of his majesty's minister, consul, or vice-consul, there, or, in the absence of any such functionary, then of two respectable merchants resident there; all which said functionaries respectively are hereby authorized and required, and all which said merchants are hereby authorized, in a summary way, to inquire into the grounds of any such proposed discharge, by examination on oath, and thereupon to grant or refuse such sanction, according to their discretion, having regard to the objects of this act.*"

The 42d sect. enacts, "That no such master shall be at liberty to leave behind, at any place abroad, either on shore or at sea, any person of his crew as aforesaid, on the plea of such person not being in a condition to proceed on the voyage, or having deserted from the ship, or otherwise disappeared, unless upon a previous certificate of one of such functionaries or merchants as aforesaid, if there be any such at all within a reasonable distance from the place where the ship shall then be, *if there be time to procure the same, certifying that such person is not in such condition, or has deserted or disappeared, and cannot be brought back; and all such functionaries as aforesaid are hereby authorized and required, on the application of any such master, to inquire, by examination on oath, into the circumstances, and to give or refuse such certificate, according to the result of such examination.*"

The 43d sect. enacts, "That, if any such master shall leave behind any one of his crew as aforesaid, contrary to this act, in any indictment or proceeding, the proof of his having obtained such sanction or certificate as aforesaid shall be upon him; it being

in the jurisdiction of the Central Criminal *Court. There were two other counts in the indictment, similar to the first, except that one [*427 charged the defendant only with leaving Wilkinson behind, and the other only with leaving Gibbs behind at Bahia, &c.

From the account of the transaction given by the witnesses for the prosecution, it appeared that Wilkinson and Gibbs were shipped at Guayaquill, in South America, in June, 1843, in the *Sarah Charlotte*, belonging to Mr. Howard, of Harwich; that they were both ill when the vessel put into Bahia on her voyage to Vigo, in Spain, in October, 1843, and went ashore at Bahia, and saw the doctor, who said they were not sick enough to be left on shore and go to the hospital, as they wished; they then went to the English consul, Mr. Porter, who said he could not do any thing for them without the doctor's certificate; and the captain then said they might take his boat and fetch their things ashore, and keep out of the consul's sight till the ship had sailed. The next day they did so, and went to a boarding-house where the captain sent them some dollars by Captain Nunn, a passenger, and the ship sailed a day or two after. When they had been on shore some time the consul's clerk saw them, and the consul, after maintaining them for about a week, sent them to England in a vessel called the *Mary*.

According to the account given by the witnesses for the defence, the facts were as follow, viz.:—That at Bahia Wilkinson and Gibbs asked the captain's leave to go ashore to see the doctor or consul, as they did not wish to stay in the ship, not being able to do their duty; that the captain *said he could not put them ashore till he had seen the consul; that they went ashore and came again, and asked for their clothes, and [*428 the mate, believing (though they did not say so) that they had got their discharge, let them have them; that they were very ill, and if they had not gone on shore at Bahia and got medical advice, one of them would have died; that the consul refused to give them a certificate, and Captain Nunn, thinking it was a cruel refusal on his part, gave the men the dollars out of his own pocket to relieve them on shore, and did not pay them as the agent of the captain.

The evidence to prove the allegation of the ownership of the vessel was that of the collector of customs of the port of Harwich, who said, "I have a certificate of the registry; the name '*James Howard*' is written here; he is a ship-owner of the port of Harwich; I did not see him write it; I know the signature; the declaration is signed by him; I know Mr. Howard personally; he is a British subject; he lives at Manningtree, near Harwich; he is the proprietor of several ships by my official books; I never saw him on board any of those ships." On his cross-examination he said, "I do not know where he was born; I know he is a British subject by the declaration which he made." On re-examination he said, "He is a house-keeper; the house has been pointed out to me that he lives in; I never saw him in that house; I know him personally; I believe him to be an Englishman."

CRESSWELL, J., who tried the case, and COLERIDGE, J., who was present, were both of opinion, 1st, that the allegation of ownership was a material allegation, and must be proved as laid; 2dly, that the 41st and 42d

the intention hereof, that, except in the case of entering into his majesty's naval service, no person of the crew shall be discharged, either with or without his consent, in any place abroad where such functionary can be found, unless he shall have given such sanction thereto."

sections of the statute did not create separate offences, but that they should be taken together, and were intended to show that certain conduct on the part of the seaman will not excuse the captain unless he produces the required certificate; and, therefore, 3dly, that, on this indictment, which *429] charged "the defendant with wrongfully and wilfully leaving behind him two persons belonging to his crew, the only answer he could give would be either to prove the certificate or show the impossibility of obtaining it; and not having done either of those things, if the jury believed the evidence, he must be found guilty.

Verdict—Guilty. Sentence, fined 5*l*.

Shepherd and *Adolphus*, for the prosecution.

Clarkson and *Ballantine*, for the defendant.

MARCH SESSION, 1844.

BEFORE LORD ABINGER, C. B., AND MR. JUSTICE WILLIAMS.

REGINA v. M'GREGOR and LAMBERT.

If the crew, or part of the crew, of a ship combine together to resist the captain, especially if the object be to deprive him of his command, it will amount to "making a revolt," within the meaning of the stat. 11 & 12 Will. 3, c. 7, s. 9; and it would be no answer to show that there were grievances, which, by their resistance, the men sought to redress.

THE first count of the indictment stated, that, on the 1st of October, 1843, on the high seas, within the jurisdiction of the Admiralty of England, and within the jurisdiction of the Central Criminal Court, William M'Gregor, late of the parish of St. George-in-the-East, in the county of Middlesex, mariner, and Charles Lambert, of the same parish, &c., mariner, were mariners, and each of them was a mariner in and on board of and belonging to a certain ship called the "*Esther*," of which said ship one Richard Lucas Williams was, on the day and year aforesaid, upon the high seas and within the jurisdiction aforesaid, the master and commander; and, further, that the said W. M'Gregor and the said C. Lambert, being such mariners as aforesaid, and each of them being such mariner as *430] aforesaid, did, on the day and year aforesaid, with force and arms, upon the high seas aforesaid, within the jurisdiction of the Admiralty of England, and within the jurisdiction of the Central Criminal Court, *piratically and feloniously make a revolt in the said ship*, the said R. L. Williams then and there being in and on board thereof, against the form of the statute, &c.(a)

The second count charged, that the prisoners did "piratically and feloniously endeavour to make a revolt in the said ship," &c.

From the evidence it appeared that the prisoners were seamen on board the brig "*Esther*," trading to the South Seas upon a whaling voyage, and had signed the ship's articles. Great complaints were made by the sailors, in the course of the voyage, about the provisions, and also about the great

(a) The stat. referred to is 11 & 12 Will. 3, c. 7, by the 9th sect. of which it is enacted, (inter alia,) that, "if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust, or shall confine his master, or make, or endeavour to make, a revolt in the ship, he shall be adjudged, deemed, and taken to be a pirate, felon, and robber," &c.

heat of the fore-castle, where the men had to sleep, which, on account of the fire for cooking, &c., being close to it, was insupportable in the warm latitudes. On the 30th of September, M'Gregor refused to go on duty. He remained off duty until the following day, when he was again desired to work, and again refused, using, at different times, violent and threatening language. The captain, in consequence, ordered the crew to put M'Gregor in irons, but instead of obeying him, they walked away forward. The prisoner Lambert had that same morning refused to go to his duty, and he and a man named Griggs went towards the captain, who, with the assistance of his officers, was endeavouring to put M'Gregor in irons. Violent language was used by both, and threats uttered against the captain, to induce him to alter his determination, and *Griggs rushed to a [*431 boat where long lances or spears used in the whale-fishery were kept, with the evident intention of seizing one of them, and releasing M'Gregor by force. A gun was handed to the captain by the steward, and the captain shot Griggs as he was in the act of laying hold of the lance or spear, and killed him on the spot. The crew then returned to their duty. The vessel put in at Rio Janeiro, and the two prisoners, M'Gregor and Lambert, were sent from that place by another vessel to England to be tried.

Lord ABINGER, C. B., (in summing up,) said—The prisoners are charged with an act of piracy, either by exciting a revolt, or endeavouring to do so. The act of Parliament contains these words, “make or endeavour to make a revolt,” and you will have to say, whether the prisoners are brought within the meaning of those words. The stat., which is the 11 & 12 Will. 3, c. 7, s. 9, enacts, that, if any person shall lay violent hands on his commander, &c., or make or endeavour to make a revolt in the ship, he shall be deemed a pirate and a robber. This particular offence was not piracy at common law. Piracy at common law involved a charge of robbery; but this act of Parliament, perhaps the better to preserve order and discipline on board a ship, makes it piracy to create a revolt, or to endeavour to excite a revolt. By revolt I understand something like rebellion or resistance to lawful authority. Persons who rebel against and resist the constituted authorities, if they are subjects, are said to be in a state of revolt; and if the crew of a ship combine together to resist the captain, especially if the object be to deprive him of his authority altogether, it will, in my opinion, amount to making a revolt. I think, upon the construction of this act of Parliament, that the resistance of one person to the authority of the captain would not be a revolt. Revolt means something more than the disobedience of one man. *You [*432 will say, whether the conduct of the crew, or some part of it, amounted, at any time, to a revolt, or, if not, whether these men by their conduct endeavoured to stir up a revolt. I think it would be straining the evidence rather too far to say, that the conduct of these men amounted to a revolt; and the charge of making a revolt, if my construction of the act is correct, will fall to the ground, and the question will be upon the evidence, whether, by their conduct, they endeavoured to excite a revolt. The question of whether the ship was properly fitted up and found is not material, for it has been decided in a case in this court, that, although there be real grievances to redress, yet it is not an answer to a charge of attempting to make a revolt.(a) If Griggs and these two men were

(a) *Rez v. Hastings and Meharg*, 1 M. C. C. R. 82. In that case the prisoners were charged, by the first count of the indictment, with betraying their trust and turning

*433] united in some common design to prevent the captain from putting M'Gregor in irons, which, on the evidence, he had sufficient justification in doing, and calling upon others of the crew to assist them in resisting the captain's authority; if you think such was their intention, then I own I think that it was an attempt to excite a revolt. The question is, whether or not you think an actual revolt was made; or, if you do not think that an actual revolt was made, then you will say whether an attempt to excite a revolt was or was not made.

Verdict—M'Gregor guilty, sentenced to a year's imprisonment; and Lambert not guilty.

Clarkson and Ballantine, for the prosecution.

pirates, and with confederating, piratically and feloniously, to run away with the ship, by the second count, with piratically and feloniously attempting to corrupt other persons of the crew so to steal and run away with the ship; by the third count, with piratically and feloniously inciting a revolt in the ship, the master being on board; and by the fourth count, with endeavouring to make such revolt. It appeared clearly that there was a revolt in the ship, and that the prisoners participated, refusing to obey orders, and being guilty of many acts of insubordination and violence. The counsel for the prisoners endeavoured to show that the prisoners and their adherents had in view a redress of supposed grievances, and not the intention of assuming the command for the purpose of carrying off the ship; and though there was some evidence that the prisoners had an ulterior object besides that of redressing ill-usage, of which it appeared they had complained, yet their acquittal on the first two counts led to the conclusion that the jury did not impute to them any other real intention than that of redressing their supposed grievances. The point submitted to the judges was, that, in order to satisfy the intent of the statute and the words of the indictment, "piratically and feloniously revolted," the object of the revolt must have been to take possession of, or run away with, the ship, or to enable the prisoners to commit some act of piracy, and not merely to resist the captain's authority, in order to force him to redress alleged grievances; but the judges present were unanimously of opinion that making or endeavouring to make a revolt, with a view to procure a redress of what the prisoners thought grievances, and without any intent to run away with the ship, or to commit any act of piracy, was an offence within the 11 & 12 Will. 3, c. 7, s. 9, and that the conviction was therefore right. See Russell on Crimes, Greaves' ed., vol. 1, pp. 97 and 98.

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*APRIL SESSION, 1844.

BEFORE BARON GURNEY, MR. JUSTICE WILLIAMS, AND MR. JUSTICE MAULE.

REGINA v. BARBER, FLETCHER, and DOREY.

On an indictment against accessories before the fact to the forgery of an administration bond on administration granted of the effects of J. S.:—*Held*, 1st, that a session-clerk from Scotland had no right to look at a kirk session book to learn the writing of a clergyman to enable him to swear to the writing of a certificate found, on the death of J. S., among his papers.

2dly, That such book was not evidence itself, and, not being so, could not be looked at for any purpose whatever:

3dly, That the certificate in question, which was a certificate purporting to have been given by the minister and elders to J. S. on leaving the kirk, would not be evidence, even if the minister's writing were proved:

4thly, That the proof that the certificate was found among papers endorsed on the outside in J. S.'s handwriting, which papers were delivered, after his death, by a servant to the master, who produced them at the trial, was no proof that the certificate had been in J. S.'s possession, the servant not being called as a witness; that the endorsement only showed that that one paper had been in Stewart's presence, and the statement in his writing was not evidence.

In cross-examining the master of J. S., the prisoner's counsel asked whether he did not

put the age (sixty-five) on the tombstone from the best information he could get; and he said he put it there in consequence of what J. S. told him.

The counsel for the prosecution asked what it was that J. S. told him;—*Held*, that this question could not be put.

It was objected, that the stat. 22 & 23 Car. 2, c. 10, requiring the bond to be given by the party to whom administration was granted, and not by the party that was entitled to administration, no forgery was made out; but the bond was a good bond within the statute, having been given by the party to whom, in fact, administration was granted:—*Held*, that this was not a good objection.

Where the counsel for several prisoners cannot agree as to the order in which they are to address the jury, the court will call upon them, not in the order of their seniority, but in the order in which the names of the prisoners stand in the indictment. But where the counsel for one prisoner has witnesses to fact to examine, the counsel for another cannot be allowed to postpone his address to the jury until after those witnesses have been examined.

THE first count of the indictment charged the three prisoners with feloniously inciting one Susannah Richards (afterwards deceased) to forge a certain administration bond, with intent to defraud the Archbishop of Canterbury. The second count stated the intent to be to defraud the Right Honourable Charles Shaw Lefevre and others, Commissioners for the Reduction of the National Debt. The third count stated the intent to be to defraud the Governor and Company of the Bank of England.

The evidence, so far as it is material for the understanding of the points decided, was as follows:—A clerk from the Prerogative Office in Doctor's Commons produced a warrant for taking the act of administration granted to Elizabeth Stewart, the bond that was executed on that occasion, and an affidavit annexed to certain certificates of baptism. A clerk from the Stamp-Office produced another affidavit, and Dr. Robertson was then called, and he said, "I am a surrogate of the Prerogative Court; the parties, purporting to be the persons named in these documents, were sworn in my presence; my signature is to this affidavit of Elizabeth Stewart and Thomas Griffin, dated 26th August, 1840. This affidavit, dated 31st July, 1840, was sworn before me, purporting to be the affidavit of Elizabeth Stewart,—here is the warrant of the amount of property sworn to, which the affidavit of the 31st July refers to,—the warrant is dated the same day the jurat is signed by me; I administered the oath to the person who swore that affidavit; this warrant is signed by me, it is dated the 31st July. The affidavits are not explained to the parties in my presence; the parties depose before me that the names subscribed to the affidavit are their names and handwriting, and that they believe the contents to be true.

A clerk from Doctors' Commons stated that he was the attesting witness to the administration bond, and saw a female, purporting to be Elizabeth Stewart, and the sureties sign it on the 31st of July, 1840, but was not acquainted with the persons of either.

Mr. Beetham, a clerk in the Bank of England, said, "I produce the stock ledger of the bank for the 51l. per cent. long annuities. I have an entry of one in the name of John Stewart, of Great Marlow. This is an examined copy of the book; this stock was transferred to the Commissioners for the Reduction of the National Debt on the 11th of October, 1836."

Another bank clerk produced the book in which the unclaimed dividends are entered; 51l. was entered on the credit side to John Stewart, of Great Marlow; in another bank book he was described as John Stewart, of Great Marlow, Bucks, gardener. It appeared that no dividends had been received since April, 1826, and that the stock had been trans-

ferred from the Commissioners for the Reduction of the National Debt on the 20th of October, 1840, to "Elizabeth Stewart, of Southampton-terrace, Southampton-street, Camberwell."

It appeared, further, that John Stewart, who was a Scotchman, lived as gardener with Mr. Strode, at Court Garden, Great Marlow, and died there in 1827. Mr. Strode was absent from home on the day of his death, and, on his return, one of the servants gave him a tin case containing papers, some of which were endorsed in Stewart's handwriting, "*My own private affairs.*" These papers were produced by Mr. Strode, but the servant, who gave them to him, was not called as a witness to show where he obtained them. Among them was a paper purporting to be a certificate of the minister and elders of the Kirk Session at Canongate, in Edinburgh, and alleged to have been given to Stewart by them.

To prove this certificate, a witness, named Hunter, was called; he said, "I am the Session-clerk of Canongate; I think I am acquainted with the handwriting of William Lothian, the minister—he is dead. I have here the handwriting of Archibald Aitkin, one of the elders; *I know his handwriting from this book, but not individually*—he is also dead, and has been dead thirty or forty years. I do not know the handwriting of Alexander Crichton, he was an elder—he is dead. I did not know Mr. Lothian; he has been dead more than fifty years. There were no books kept by him; the public books in which his signature appears have come into my hands; I have not become acquainted with his handwriting by seeing those books; *I have not had occasion to refer to them, and to act upon his signature*; this book is the minutes of the Kirk Session of Canongate, and is kept for the purpose of minuting the transactions of that body; I have never referred *437] to them *that length of time back; I have looked over it since this business; it is the course of business for the minister to sign these minutes; I have the minutes during the time this gentleman was minister; I have not, by looking at those minutes, acquired such a knowledge of his handwriting as to be able to form an opinion whether it is his signature." He was then asked this question: "I want to know, whether, looking at the minutes, and looking at that gentleman's handwriting, you can form any opinion whether that is his handwriting?" His reply was, "*My opinion is, that it is.*" I have been able to form an opinion from that source." He was further asked, "Is it usual for the ministers and elders of the kirk session, when a person leaves a congregation, to give any certificate, so as to enable him to be admitted into any other congregation?" He answered, "If they ask for it, it is given—it is usual; if they apply to be received into another congregation, it is usual to require a certificate from the congregation they have left."

It was then proposed, on the part of the prosecution, to read the certificate.

This was objected to, on the part of the counsel for the respective prisoners, on four grounds. 1st, that the handwriting had not been proved, as the witness from Scotland had no right to look at the kirk session book, in order to become acquainted with the handwriting of the minister, so as to enable him to swear to his belief of that handwriting; 2dly, that the kirk session book was not evidence itself, and, not being so, could not be looked at for any purpose whatever; 3dly, that the certificate itself could not be evidence, even if the minister's handwriting had been proved; 4thly, that, as the servant who delivered the papers to Mr. Strode was not called as a witness, there was no proof that the certificate had ever been

in Stewart's possession at all; and, with respect to the endorsement in Stewart's handwriting on the paper produced, that endorsement was not evidence in itself; and the fact of *Stewart's writing being upon that paper only showed that that particular paper had been once in his presence. [*438]

THE JUDGES were all of opinion that the certificate was not receivable in evidence, and it was not read.

Mr. Strode having stated that he caused a stone to be erected to the memory of Stewart, was asked, in cross-examination by *Greaves*, for the prisoner Fletcher, whether he had not put the age of Stewart (sixty-five) on the tombstone from the best information which he could obtain, and his reply was, that he put it there in consequence of what Stewart had told him.

Sir *F. Pollock*, attorney-general, asked what Stewart had told him.

Greaves objected, that, as he only inquired into the witness's reason for doing a certain act, and had not asked what the conversation was, or what was said, it was not competent to the attorney-general to put such a question.

THE JUDGES held that the question could not be put.

The case for the prosecution having closed,

Greaves, for the prisoner Fletcher, said that he should claim his right, on behalf of Fletcher, to address the jury after Mr. *Wilkins*, who was counsel for Barber, had addressed the jury on his behalf.

Wilkins submitted, that, as Mr. *Greaves* was his senior at the bar, he ought to make his address to the jury first.

GURNEY, B., (WILLIAMS, J., and MAULE, J., being present,) said—The rule is this—if the counsel cannot agree among themselves on the course to be adopted, it is for *the court to call upon the counsel for the prisoners to address the jury in the order in which the prisoners are named in the indictment. [*439]

Wilkins requested that his lordship would consult the other judges on the subject, as the present ruling, he submitted, was contrary to the usual practice.

GURNEY, B.—We are all of us agreed upon the subject.

Wilkins then addressed the jury on behalf of Barber, whose name stood first in the indictment; and having expressed an intention to call witnesses,

Greaves submitted that he ought to be at liberty to postpone his address to the jury until after those witnesses had been examined. He cited *Beale v. Moults*, ante, p. 1, and others.

THE JUDGES were of opinion that he was not entitled to adopt that course, and both *Greaves* and *E. James* severally addressed the jury on behalf of Fletcher and Dorey, before *Wilkins* called his witnesses for Barber.

When his lordship was about to sum up the case to the jury,

Greaves, for the prisoner Fletcher, referred to the stat. 22 & 23 Car. 2, c. 10.—That statute provides, that, on administration being granted, the bond shall be taken of the person to whom the administration is to be granted; and, in point of fact, it was so taken in this case; and, though in a wrong name, yet it was a bond taken in pursuance of the statute, and, being within the statute, it cannot be treated as a forgery. If the Archbishop had *brought an action on the bond, it would have been impossible for the person who gave it to avoid it, for she would be estopped by her execution of it from denying her name. It is a novel [*440]

case. There is no case of a bond given under similar requirements in any act of Parliament. I submit that this point is worthy of consideration.^(a)

Clarkson, for the prosecution.—*R. v. Rigaud* ^(b) is the case of the forgery of an administration bond.

Greaves.—If a person who does not go to the Prerogative office at all makes out a bond as if he had been there, that will be a forgery; but if the person to whom the administration is in fact granted gives the bond, though in a false name, it cannot be a forgery, for all the requirements of the statute have been complied with.

GURNEY, B., (after consulting with WILLIAMS, J., and MAULE, J.,) said—I really cannot see any force in this objection. The act requires that a bond should be given. The indictment alleges that a person in the name of Elizabeth Stewart, that not being her name at all, executed a bond as if she were really Elizabeth Stewart, and that is the forgery of a bond.

GURNEY, B., in summing up, (inter alia,) said,—The substance of the charge in the indictment is, that one Georgiana Richards forged an administration bond; and the intent is laid, in different counts, to be to defraud the Archbishop of Canterbury, the Commissioners for the Reduction of the National Debt, and the Governor and Company of the Bank of England, from whose clerks the money was eventually obtained. The indictment further alleges, that the three prisoners were accessaries before the fact to the forgery of the bond; that is, that they, in some way or other, assisted in the transaction; that they have done acts to further the commission of the forgery. The letters of administration were granted to Elizabeth Stewart, as sister and administratrix of her brother. This is the general nature of the case; and you will pay attention to the different acts done by the different prisoners, and form your judgment whether those acts do or do not inculpate them within the terms of the indictment. The date of the bond is the 31st of July, 1840. You will keep that date before your minds, for the prisoners are charged as accessaries before the fact to the forgery, and you must find some guilty part taken by the prisoners at the bar before the bond was executed; that is, before that day, the 31st July, 1840. His lordship recapitulated the evidence, and the jury found

Fletcher and Dorey guilty, and Barber, not guilty.

Sir F. Pollock, A. G., *Clarkson*, *Bodkin*, and Sir J. Bayley, for the crown.

Wilkins and *Parry*, for the prisoner Barber.

Greaves and *Ballentine*, for the prisoner Fletcher.

E. James, for the prisoner Dorey.

(a) The words of the statute are, "That all ordinaries, as well the judges of the Prerogative Courts of Canterbury and York for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may, upon their respective granting and committing of administration of the goods of persons dying intestate after the 1st day of June, 1671, of the respective person or persons to whom any administration is to be committed, take sufficient bonds, with two or more able surties, respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following." &c.

(b) O. B., Feb. 18, 1828.

*BEFORE MR. JUSTICE WILLIAMS.

[*442]

REGINA v. BARBER, FLETCHER, and Others.

Three persons were *jointly* charged with procuring certain other persons to utter a forged will. The only evidence for the prosecution was of *separate acts*, at separate times and places, done by each of the persons charged as accessaries. At the end of that evidence one of them pleaded guilty:—*Held*, that the other two might, notwithstanding, be convicted.

THE first count of the indictment charged all the prisoners with feloniously inciting a certain evil-disposed person, unknown, to forge a certain will, with intent to defraud one Ann Slack. The second count charged Barber and Lydia Saunders with uttering the will, knowing it to be forged, and Mrs. Dorey, Fletcher, and William Saunders, with being accessaries before the fact.

The evidence for the prosecution did not show any joint act done by the accessaries, but only separate and independent acts done at separate and distinct times and places. After all the evidence on the part of the prosecution had been given, Mrs. Dorey pleaded guilty. Upon this,

Greaves, for the prisoner Fletcher, contended that the other persons charged also as accessaries were entitled to an acquittal; that every act which made a party an accessory constituted a felony, and it should be charged accordingly, and here the indictment having charged a joint procuring, and there being no evidence of any joint procuring, only one could be convicted. He referred to *Regina v. Massingham*, 1 M. C. C. R. 257, as precisely in point in principle.

WILLIAMS, J., was of opinion, that the objection was not a good objection in point of law; and the jury found

Barber, Fletcher, Lydia Saunders, and Amelia Dorey, guilty; and

William Saunders, not guilty.^(a)

**Erle, Clarkson, Bodkin*, and Sir *John Bayley*, for the Crown. [*443]

Wilkins and Parry, for Barber.

Stone and Phinn, for Lydia and William Saunders.

Greaves and Ballantine, for Fletcher.

E. James, for Amelia Dorey.

(a) Fletcher and Barber were sentenced to be transported for life; Mrs. Saunders and Mrs. Dorey, to be imprisoned for two years; and William Saunders was arraigned on another indictment, which charged him with feloniously inciting a certain evil-disposed person to forge a certain testamentary writing, purporting to be the last will of Mary Hunt. To this he pleaded guilty, and was sentenced to be transported for seven years.

*PROMOTIONS.

[*444]

IN the Vacation after Hilary Term, 1843, *N. R. Clarke*, Esq., and *J. B. Byles*, Esq., were called to the degree of the coif.

In Easter Term, 1843, Mr. Serjeant *Wrangham* received a Patent of Precedency.

In the same term, Sir *G. Lewin*, Knight, the Hon. *J. C. Talbot*, *S. Martin*, Esq., *J. A. Roebuck*, Esq., and *W. H. Watson*, Esq., were appointed her majesty's counsel learned in the law.

In the same term, *Thomas Pemberton Leigh*, Esq., was appointed chan-

cellor to the Prince of Wales, and the Hon. *J. C. Talbot*, attorney-general to the Prince of Wales.

In the Vacation after Michaelmas Term, 1843, *John Romilly, Esq.*, was appointed one of her majesty's counsel learned in the law.

In Easter Term, 1844, Sir *F. Pollock*, Knight, was appointed Lord Chief Baron of the Court of Exchequer, *vice* Lord ABINGER, deceased.

In the same term, Sir *W. W. Follett*, Knight, was appointed attorney general, *vice* Sir *F. Pollock*; and *F. Thesiger, Esq.*, was appointed solicitor-general, *vice* Sir *W. W. Follett*.

*445] OXFORD SUMMER CIRCUIT, 1844.

BEFORE LORD CHIEF JUSTICE TINDAL AND MR. SERJEANT ATCHERLEY.

ABINGDON ASSIZES.

(*Civil Side.*)

BEFORE LORD CHIEF JUSTICE TINDAL.

STROUD and Others, Executrix and Executors of JOHN STROUD, v
DANDRIDGE, Administrator of WILLIAM BESLEY.

On a plea of *plene administravit*, it was proved, on the part of the plaintiffs, that at the time of the death of the intestate, there were crops on his farm, but that there had been an auction on the premises about a month before, at which these crops were put up for sale:—*Held*, that, as the crops remained on the premises at the time of the death of the intestate, it lay on the defendant, as administrator, to show that these crops had not come to his hands.

On a plea of *plene administravit*, it appeared that the intestate, six months before his death, had assigned all his effects to trustees for the benefit of such of his creditors as should execute the deed of assignment. The deed was executed by himself and the trustees, but not by any other creditor:—*Held*, that the administrator might give in evidence advertisements published soon after the execution of the deed, stating where the deed lay for execution by the creditors, and calling a meeting of creditors as to the sale of the effects, and also a resolution of that meeting, that the effects should be sold, as this evidence went to show that the deed was acted upon, and was a *bonâ fide* and not a fraudulent deed.

DEBT on a bond for £200, given by the defendant's intestate to the plaintiff's testator, dated the 9th of August, 1816. Pleas—1st, *non est factum*; 2d, *plene administravit*.

The execution of the bond was proved; and, with a view of showing assets of the intestate in the hands of the defendant, it was proved by Mr. George Besley, that the intestate, who had been a farmer, died on the 12th of August, 1834, and that the crops on his premises at the time of his death were worth about £400. But this witness also *stated, that
*446] there had been a sale by auction at the intestate's premises in July, 1834, at which the crops had been put up for sale.

Godson, for the defendant.—I submit, that upon this evidence it appears that whatever crops were on the premises had been sold.

TINDAL, C. J.—For aught that appears, every thing might have been bought in. It is in proof that the intestate had a farm, on which, at the time of his death, were crops to the amount of several hundred pounds; the administrator had the right to all he died possessed of.

Godson.—Does your lordship think that this throws on the defendant the burden of proof of what the deceased really died possessed of?

TINDAL, C. J.—I think it does.

It was opened by *Godson*, for the defendant, that the intestate had, on the 21st of February, in the year 1834, executed a deed of assignment, by which he assigned the whole of his property to Mr. John Robey and Mr. James Cowdery, for the benefit of his creditors; and that Mr. Robey and Mr. Cowdery, by an advertisement in the Berkshire newspapers, convened a meeting of the creditors of the intestate, who, on the 3d of April, 1834, came to a resolution to sell the stock and crops by auction, upon which the trustees directed the sale of the stock in April, 1843, and the sale of the crops in July, 1843, and the proceeds of these two sales had been accounted for by the auctioneers to the trustees, the defendant never having received a shilling, he being a creditor, who, by the advice of counsel, had taken out administration, in order that there might be a personal representative of the intestate, to appear as a party to some Chancery proceedings respecting some other property of the intestate.

*The deed of assignment was put in and read. It was dated the 21st of February, 1834, and purported to be made between the [447 intestate of the first part, Messrs. Robey and Cowdery (the trustees for the benefit of creditors) of the second part, and the several persons, creditors of the intestate, who should execute it, of the third part. It was executed on the day of the date by the intestate and by the trustees, but not at any time by any other creditor. By this deed the intestate conveyed "all and singular" his "farming stock, crops," &c., "and effects whatsoever," to the trustees, upon trust, to sell them at such time or times as a majority, in number and value, of the creditors, at a meeting to be called with seven days' notice, should direct, and divide the proceeds among those creditors who should execute this deed.

It was proposed, on the part of the defendant, to give in evidence an advertisement in the Reading Mercury of the 3d of March, 1834, which stated, that this deed had been executed by the intestate, and that it lay for the creditors to execute at the office of Mr. Frankum, at Abingdon. Also an advertisement in the Berkshire Chronicle of the 29th of March, 1834, signed, "By order of the trustees, Thomas Frankum, their solicitor," giving notice of a meeting of the creditors of the intestate on the 3d of April, 1834, to assent to, or dissent from, the trustees proceeding to an immediate sale of the effects. Also a resolution entered into at the meeting of creditors on the 3d of April, 1834, directing the trustees to sell the stock and crops. It was proved by Mr. Frankum that he caused the advertisements to be published, and did so by order of the trustees; and he also proved the resolutions of the meeting of the creditors to which he was the attesting witness.

Whateley, for the plaintiffs.—I submit, that these advertisements and the resolution of the creditors are not receivable in evidence against the plaintiffs, as they are no *parties to the publication of the advertisements, [448 and were not present at the meeting of creditors.

TINDAL, C. J.—I think that the whole of this evidence is receivable, as showing that the deed was acted upon within a reasonable time after it was made. It is a deed executed by the debtor and by the trustees, and by no other creditor, and, being thus circumstanced, you might contend that it was a deed that was never acted upon, and that it was a fraudulent deed merely made to prevent the property from being taken in execution. On the other hand, this evidence is given to show that the deed was acted upon soon after its execution.

The advertisements, and the resolutions entered into at the meeting of the creditors, were read in evidence.

It was proved by Mr. Belcher, that he and his partner, who were auctioneers, sold the farming stock and crops of the intestate by auction, by order of Mr. Robey and Mr. Cowdery, the former in April, 1834, the latter in July, 1834; and that he and his partner had accounted with Mr. Robey and Mr. Cowdery for the proceeds of those sales, amounting to 544*l.* 4*s.* 2*d.*, but that no money whatever had been either accounted for or paid to the defendant either by him or his partner.

TINDAL, C. J., (to the jury).—As far as the intestate was concerned, he had divested himself of this property, and the defendant by this evidence has made out his second plea.

Verdict for the plaintiffs on the first issue, and for the defendant on the second issue.

Whateley and Keating, for the plaintiffs.

Godson and Carrington, for the defendant.

***449] *GREEN and COX, Assignees of RICHARD PUSEY, a Bankrupt, v. BRADFIELD.**

A., a trader, on the 2d of October, gave B., one of his creditors, an order for money drawn by a board of guardians of the poor on their treasurer, payable to A., but not to bearer or order. On the 4th of October A. committed an act of bankruptcy, of which B. had notice on the 5th. On the 9th, the treasurer of the union paid B. the amount of the order. A fiat of bankruptcy issued against A. on the 22d of November:—*Held*, that A.'s assignees could not recover the amount of the order in an action for money had and received by B., as this was a "transaction" protected by the stat. 2 & 3 Vict. c. 29, s. 1, and that the "transaction" was, so far as the bankrupt was concerned, complete on the 2d of October.

To determine whether a fraudulent preference has been given by a bankrupt to one of his creditors by a payment, it will be for the jury to say whether the payment was voluntary, and without any pressure by the creditor, and was made when the debtor knew that he must be a bankrupt, and in contemplation of bankruptcy.

In order to constitute "pressure," it is not necessary that legal proceedings should have been resorted to, for, if the pressure was such that it overweighed the bankrupt's own inclination, and induced him to pay against his will, that would be sufficient pressure within the meaning of the bankrupt laws.

From a person being in embarrassed circumstances, it does not necessarily follow that he contemplates bankruptcy, as he may hope that his affairs may rally and come round.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiffs as assignees, and on an account stated with the plaintiffs as assignees.—Plea, *non assumpsit*.

It was opened by *Godson*, for the plaintiffs, that in the month of September, 1843, the bankrupt, who was a baker, was indebted to Mr. Cox, one of the plaintiffs, in a sum of £75, for which Mr. Cox pressed for payment; and on several occasions in that month the bankrupt promised to

pay Mr. Cox as soon as he was paid a sum of money which he stated to be due to him from the Abingdon Union; and the bankrupt, having afterwards obtained an order of the board of guardians of the poor of the Abingdon Union on their treasurer for a sum of 19*l.* 0*s.* 2½*d.*, which order was payable to the bankrupt only, and not to order or bearer, the bankrupt gave it to his brother on the 2d of October, 1843, together with £11 in cash, desiring him to pay it to the defendant, (who was also a creditor of the bankrupt,) which the bankrupt's brother accordingly did on the evening of the 2d of October; and about an hour after that the bankrupt consulted a friend as to making a composition with his creditors, he being then insolvent. On the 4th of October the bankrupt committed an act of bankruptcy, of which the defendant had notice on the 5th; and the treasurer of the Abingdon Union being Mr. Knapp, who was *a banker with whom the defendant kept an account, the defendant, on the 9th of [450] October, took the order for the 19*l.* 0*s.* 2½*d.* to him, and he then transferred the amount from the account of the bankrupt to the account of the defendant on the mere presentment of the order; and on the 22d of November a fiat of bankruptcy issued against the bankrupt, under which the plaintiffs were appointed assignees.

TINDAL, C. J.—The £11 and the order came to the defendant's hands before the fiat, and the late act of Parliament (a) cures all up to the fiat, unless it was a fraudulent preference.

*Godson.—I submit, as to the sum of 19*l.* 0*s.* 2½*d.*, that, as the [451] order was not transferable, and was not a negotiable instrument, no money of the bankrupt was received by the defendant till the 9th of October, which is after the defendant had notice of an act of bankruptcy; and,

(a) The stat. 2 & 3 Vict. c. 29, by which, after reciting that by the stat. 6 Geo. 4, c. 16, "all payments really and *bonâ fide* made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) should be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed, and that all payments really and *bonâ fide* made to any bankrupt before the date and issuing of the commission against such bankrupt should be deemed valid, notwithstanding any prior act of bankruptcy committed, and that such creditor should not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt had not at the time of such payment to such bankrupt notice of any bankruptcy committed: And whereas, by an act passed in this present session of Parliament, intitled 'An act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fiats in Bankruptcy,' [the stat. 2 Vict. c. 11,] it is enacted, that all conveyances by any bankrupt *bonâ fide* made and executed before the date and issuing of the fiat against such bankrupt shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons to whom such bankrupt so conveyed had not at the time of such conveyance notice of any prior act of bankruptcy by him committed:—And whereas it is expedient that further protection should be given to persons dealing with bankrupts before the issuing of any fiat against them." It is therefore enacted, "That all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt *bonâ fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also, that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such fraudulent preference."

further, I put it, with respect to the whole amount of 30*l.* 0*s.* 2½*d.*, that the delivery of this order to the defendant was, under all the circumstances, of itself an act of bankruptcy. I also submit, that there was in this case a fraudulent preference, for, although there may be no specific evidence to show that the bankrupt contemplated bankruptcy, it was laid down by Lord DENMAN, C. J., in the case of *Aldred, assignee of Brown, v. Constable*, 12 Law J., N. S., Q. B., 253, that the contemplation of insolvency is so far from being inconsistent with that of bankruptcy, that it is material evidence among the ingredients of proving it, and it is not necessary that a particular act of bankruptcy must have been in contemplation to make a preference fraudulent and void.

It was proved that the bankrupt committed an act of bankruptcy on the 4th of October, 1843, which the defendant knew of on the 5th; and that on the 2d he gave the sum of £11 in cash and the order on the treasurer of the union to his brother to give to the defendant, which he did on that evening; and that about an hour afterwards on the same evening the defendant consulted a person *named Griffin as to making a composition with his creditors, and by his advice consulted Mr. Frankum, (who was a solicitor) on the subject on the same evening; and that on the 9th of October, the order (which was put in and read) was presented at the banking-house of Messrs. Knapp, and its amount transferred from the credit of the Abingdon Union to that of the defendant. And the fiat in bankruptcy against the defendant, dated November 22d, 1844, was also put in.

The order was in the following form:—

Abingdon Union,
The 28th day of September, 1843.

No. 298.
The Treasurer of the Abingdon Union, Pay R. Pusey the sum of nineteen pounds and two-pence halfpenny.

£19 0*s.* 2½*d.*

R. C. LATHAM, *Presiding Chairman.*

JAMES SIMMONS, } *Guardians.*
WM. FRANKLIN, }

RICH. ELLIS, *Clerk of the Board of
Guardians.*

Talfourd, Serjt., addressed the jury for the defendant.—To entitle the plaintiffs to recover in this action, you must be satisfied that this payment by the bankrupt to the defendant was voluntary, and that at the time of it the bankrupt either contemplated a bankruptcy or was in such circumstances that a bankruptcy was unavoidable. If this payment was made in consequence of previous arrangement, and was not the spontaneous act of the debtor, it will not be a fraudulent preference. Then, did the bankrupt at the time of this payment contemplate bankruptcy, or was the state of things such that it was inevitable? If (as will be proved by the bankrupt himself) he was in difficulties, but still hoped to go on, that will not be such a state of things as will allow the plaintiffs to recover in this action.

*453] For the defendant, Richard Pusey (the bankrupt) was called. He stated, that the defendant supplied him with flour, and that he (the bankrupt) supplied the Abingdon Union with bread from the early part of the year 1843, and that he had then agreed with the defendant that the latter should supply him with flour at 3*s.* a sack, and be paid for it at the end of each quarter from the money that he (the bankrupt) received

from the union. This witness further said, "I did not think to give up business till after I had seen Mr. Griffin. He advised me to go to Mr. Frankum, who said I had better give up. I had not thought of giving up business till the evening of the 2d of October. I had no design to make over my effects, and till the 2d of October I intended to have tried to have kept on my business."

TINDAL, C. J., (in summing up.)—The ground on which the plaintiffs seek to recover this sum of £30 is, that Richard Pusey, knowing that his affairs were in that condition and posture that a fiat in bankruptcy would be issued against him, thought proper, of his own accord, to pay that sum to Mr. Bradfield, one of his creditors; and, if you are satisfied upon the evidence that the money was paid without any pressure on the part of Mr. Bradfield, and also that Pusey knew he must be a bankrupt, and paid the money in contemplation of bankruptcy, the plaintiffs have a right to recover in this action; but, unless those circumstances concur, you ought to find for the defendant. The two points which you must consider are very narrow indeed, and the evidence relating to them lies in a very small compass, for it does not signify a doit, as it seems to me, whether Mr. Cox pressed for his money, or not. Mr. Cox was pressing Pusey for payment, no doubt, from night till morning, and so might twenty other persons have done; but the question for your consideration on the first point is, whether the money paid to the defendant was a voluntary payment. In order to constitute "pressure," it is not necessary that legal proceedings should have been resorted to; for, if the pressure was [*454 such that it overweighed Pusey's own inclination, and induced him to pay against his will, that would be sufficient pressure within the meaning of the bankrupt laws. Assuming you to be satisfied that the pressure is made out, you will then have to say, whether you are satisfied that the payment was made in contemplation of bankruptcy. You will observe that the fiat did not issue till near seven weeks after the payment of the money, and, although there is no doubt that Pusey was in embarrassed circumstances at the time, it does not necessarily follow that he contemplated bankruptcy, as a man might hope that his affairs would rally and come round again. Nothing appears either to lead the mind to the conclusion that a bankruptcy was contemplated at the meeting which took place when the assignment was proposed, and the bankrupt himself states that he had never thought of such a thing. However, you will take the whole of the evidence into your consideration, and return such a verdict as you think the evidence will warrant you in finding. Verdict for the defendant.

Godson and Carrington, for the plaintiffs.

Talfourd, Serjt., and *Tyrwhitt*, for the defendant.

COURT OF QUEEN'S BENCH.

BEFORE LORD DENMAN, C. J., WILLIAMS, J., COLERIDGE, J., AND WIGHTMAN, J.

Godson applied for a new trial, first, on the ground, that, as the defendant had, on the 5th of October, notice of an act of bankruptcy of Richard Pusey on the 4th, the receipt of the money by him on the 9th of October, from the *treasurer of the Abingdon Union, was not protected [*455 by the statute 2 & 3 Vict. c. 29

COLERIDGE, J.—All that the bankrupt ever did was on the 2d of October. Is not the bankrupt giving the paper to the defendant the only “transaction” with him?

Godson, I submit, that it was only an incomplete transaction until the treasurer so acted as to convert the order into money. There is also another point, which is, that the Lord Chief Justice left the case to the jury, on the question, whether the bankrupt contemplated bankruptcy. Now, I submit, that his lordship should have left it to them also to say, whether the bankrupt did not contemplate insolvency; and that, when it is the intention of the bankrupt to distribute his property among his creditors, it is immaterial whether he contemplated doing so by bankruptcy or by insolvency. This appears from the cases of *Aldred v. Constable*, 12 Law J., N. S., Q. B., 253, and *Ogden v. Stone*, 11 Mee. & W. 494. In the latter case, Baron ALDERSON said, “Is not the true construction this, that if amongst other results the party contemplates insolvency, and makes the payment to defeat an equal distribution of his effects amongst his creditors, that is sufficient?”

LORD DENMAN, C. J.—I think the cases cited are not applicable to the present, as it does not appear that the bankrupt here ever contemplated insolvency; and it also appears to me, that there is no ground for saying, that there was any “transaction” with the bankrupt after the 2d of October; but we will confer with the Lord Chief Justice.

*456] On a subsequent day, LORD DENMAN, C. J., said, that “in this case there would be no rule, as the court was of opinion that the “transaction” with the bankrupt was complete on the 2d of October, and that the case had been properly left to the jury by the Lord Chief Justice.

(Crown Side.)

BEFORE MR. SERJEANT ATCHERLEY.

REGINA v. ROBINS.

A. went in the night to the house of B., and placed a ladder against a window, and held it for J., the daughter of B., to descend, which she did, and then eloped with A. J. was a girl under sixteen, viz. fifteen years old:—*Held*, that this was a “taking” of J. out of the possession of her father within the stat. 9 Geo. 4, c. 31, s. 20, although J. had herself proposed to A. to bring the ladder and to elope with him.

Held, also, that it was no defence for A., that he did not know that J. was under sixteen, or that from her appearance he might have thought she was of a greater age.

ABDUCTION.—Indictment on the stat. 9 Geo. 4, c. 31, s. 20, which charged, that the defendant, on the 7th of May, 1844, at West Woodhay, “unlawfully did take and cause to be taken one Jane Willavize, out of the possession and against the will of William Willavize, her father, she the said Jane Willavize then and there being an unmarried girl, under the age of sixteen years, to wit, of the age of fifteen years, against the form of the statute,” &c.

It was proved by Mr. William Willavize, that his daughter was between fifteen and sixteen years of age, and would not be sixteen years of age till the month of October, 1844; and that he was at home at the time when she was born. He also proved, that she resided in his house up to the 6th of May, 1844, and was there, as usual, on that night when the family

went to bed, and that on the morning of the 7th she was missing from his house. It was further proved by Jane Willavize herself, that, on the night between the 6th and 7th of May, 1844, she went to the window of a loft, to which she had access from her bedroom, and there found a ladder reared up against the "window ; and that she went down this ladder, which the defendant held for her to descend ; and that she then [*457] went with him to Reading, and thence to Brentford, where she had cohabited for three weeks with the defendant, who was 18 years old, and was her father's under-carter. In her cross-examination she stated, that she expected to find the ladder at the window, and that she had previously arranged with the defendant to bring the ladder, and to elope with him, and that he had never proposed it to her.

J. Jefferys Williams, for the defendant, objected, that this was not a taking, or causing to be taken, within the stat. 9 Geo. 4, c. 31, s. 20, and relied upon the case of *Regina v. Mary Ann Meadows* before Baron PARKE, ante, p. 399.

Selfe, for the prosecution.—That case might have been decided on the ground, that the child, when taken away, was not in the possession of any person. Can it be said, if a man places a ladder at a window, and induces a young girl to leave her father's house by coming down it, that that is not a taking her from the possession of her father? In the case cited there was no actual taking of the girl out of the possession of her mistress, as the girl was, at the time of the abduction, far away from her mistress, and from her mistress's house.

ATCHERLEY, Serjt.—There is a case in Keble in its circumstances a good deal resembling the present.(a)

**J. Jefferys Williams*.—Whatever might have been the law in Keble's time, the court can now only go upon the stat. 9 Geo. 4, c. 31. [*458]

(a) The case of *Rex v. Twisleton and others*, 2 Keb. 432, Mich. T., 20 Car. 2. In that case, "in an information for conspiracy, and the deceitful and riotous taking away of a girl fifteen years of age, without the father's consent, being in the custody of her father, the court conceived this an offence at common law, and the statutes 4 & 5 Ph. & Mar. and 3 H. 7, [relating to abduction,] were but for aggravation of punishment, and do not create any offence originally ; and albeit the girl did consent before, yet the court took no regard to this, but directed the jury to find them guilty, who, after some dispute with the court, did so. Parents might have trespass on the stat. 4 & 5 Phil. & Mar. c. 8." That case is also reported in 1 Sid. 387, where it is said, that several exceptions were taken to the information, (not stating what they were,) but that all of them were overruled. The report in Siderfin states the information to have been for taking and marrying the sole daughter and heir apparent of — Twisleton, of Kent, without the assent and against the will of her father, but does not state that the information was for a conspiracy. The case of *Rex v. Twisleton and others* is also reported by Mr. Justice Levinz (1 Lev. 257) as follows :—"Information for this, that the defendants, using to come and be entertained at the house of another Twisleton, seduced his daughter, being his heir apparent to a great estate, to marry her ; and that the defendants Twisleton and the others, without the assent of her father, carried the girl from her father's house, and the defendant Twisleton married her ; and, on a trial at bar, it appeared in evidence, that the defendant Twisleton, being a remote kinsman and of little fortune, being frequently entertained at the house of her father, made love to the daughter, but there was no proof of any seducements, but ordinary compliments between the young people ; and it was offered in evidence, that the encouragement to this affair proceeded from the daughter, whom the father intended to marry to another kinsman of his name of more considerable estate that the daughter loved not so well ; and that the daughter, by agreement between her and the defendants, went from the house of her father to a place appointed, and there met the defendants, and was married to the defendant Twisleton ; on which the court directed the jury—that the daughter, being of tender years, viz. under sixteen, and a great fortune, this was an offence in the defendants within the information ; and that they ought to find them guilty, which they did, but *hesitantius ut semble*, and then before any fine imposed *partes concordaverunt*."

1. is suggested, that the case of *Regina v. Meadows* might have gone on the ground that the girl was not taken from her mistress, because she was out on an errand; but that is not the ground stated by the learned baron as that on which he decided that case; and, if it were held, that a child was out of its father's custody and possession, merely because it was sent on an errand, or was out for a walk, the most serious consequences would ensue.

*459] *ATCHERLEY*, Serjt.—The words of the 21st section of the stat. 9 Geo. 4, c. 29, are, "That, if any person shall maliciously, either by force or fraud, lead, or take away, or decoy, or entice away, or detain any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such articles may belong," he shall be guilty of felony; but the 20th section only says, "That, if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father, or mother, or of any other person having the lawful care or charge of her," he shall be guilty of a misdemeanor, and it is not required that it should be with any particular intent. It is said here, that there was no taking, because the girl was willing to go; and, to support that view of the case, it must be contended that there never can be a taking within this enactment where the girl is a consenting party. But it appears to me, that, if a man takes a girl under sixteen from her father's house, under the circumstances that have been proved here, that is an unlawful taking within the meaning of this act. I cannot introduce more into the statute than it contains, but the object of the enactment was, to provide for such cases as this.

J. Jefferys Williams addressed the jury for the defendant, and submitted, that the defendant probably did not know that Jane Willavize was under sixteen years of age, as her appearance led to a supposition that she was older.

ATCHERLEY, Serjt., (in summing up.)—In cases of this kind there must be great variety of circumstances. Here you find a lad of eighteen, who runs away with a girl who is between fifteen and sixteen. There is no force and no fraud, and we find that he planted the ladder at a window, and she came down it to elope with him; and the rest of the case *460] shows, that this young girl, probably under some vague notion of marriage, is carried away to Reading, and thence to Brentford, and for three weeks cohabits with this person, and is thus ruined for life. With respect to the defendant not knowing that she was sixteen, I hold that the case is within the act if the girl was in fact not sixteen years of age, and that a person taking her away does so at his peril. By her appearance and her forwardness, for it was she that made the proposal to elope, the defendant might have taken her for more than sixteen; but that is no ground of defence, however it may be matter of mitigation. My opinion is, that, if this girl was under sixteen, and the defendant knew her to be under the care of her father, and made a bargain with her to take her away, and did so, this is a case within the act of Parliament that has been referred to, and you ought to find him guilty on this indictment.

Verdict—Guilty; sentence, a fine of 1s.

Selfe, for the prosecution.

J. Jefferys Williams, for the defendant.

ATCHERLEY, Serjt.—I mentioned the case of abduction, *Regina v. Robins*, to the Lord Chief Justice TINDAL, and he is of opinion, that my direction to the jury at Abingdon was right, and that there was a taking of the prosecutor's daughter within the stat. 9 Geo. 4, c. 31, s. 20.

*REGINA on the Prosecution of WILLIAM HUMPHREYS v. [*461
WILLIAM HIBBURD, indicted as JOHN HEBBOTT.

An indictment had been found at the assizes in 1840 against A., the clerk of the course at Ascot, for a misdemeanor, in keeping a gaming-booth there. In 1844 he was taken on a judge's warrant, founded on that indictment, and gave bail to appear at the next assizes, and there plead to the indictment and take his trial. He appeared at the next assizes, and it was shown by affidavit, that the prosecutor could not be found, so as to be served with notice of trial:—*Held*, that the defendant could not be acquitted, as no notice of trial had been given; but, on the defendant surrendering to the governor of the prison immediately before the end of the assizes, the judge directed the prosecutor and witnesses to be called three times; and they not answering, the judge ordered, that the defendant should be discharged by proclamation, and that he should not be called upon to enter into any fresh recognisance.

THE defendant had, at the Berkshire Summer Assizes, 1840, been indicted by the name of John Hebbott for keeping a gaming-house on Ascot Heath at the time of the races there in 1840. The indictment consisted of three counts, and the grand jury had found it a true bill. The first count was for keeping a common gaming-house; second count, for keeping a common gaming-room; third count, for keeping a tent, booth, and place for gaming. The indictment included other persons besides the present defendant, and those persons had been acquitted at the Berkshire Spring Assizes of 1841. In June, 1842, the present defendant, while acting as clerk of the course at the Ascot races, was taken on a judge's warrant, founded on this indictment, by a metropolitan policeman of the A division, and taken before Mr. Hall, the chief magistrate of police, and by him discharged; and on the 19th of June, 1844, while attending as judge at the Hatcham Park races, the present defendant was again taken on the same warrant and carried before Mr. Combe, the police magistrate, before whom the present defendant entered into a recognisance with two sureties, with a condition that he should "appear at the next assizes for the county of Berks, and there plead to, and take his trial on, an indictment for misdemeanor standing against him in the name of John Hebbott." The present defendant now appeared at these assizes, but no prosecutor or witness appeared against him.

Tyrwhitt, for the defendant, applied, that the defendant might be permitted to take his trial in order that he might be acquitted, and that there might be a record of his acquittal. He stated that the defendant [*462 had been unable to find the prosecutor in order to give him ten days' notice of trial, and he relied on the fact of the defendant never having traversed so as to make such notice requisite.

ATCHERLEY, Serjt.—I cannot allow the defendant to be acquitted if no notice of trial has been given to the prosecutor.

Just before the end of the assizes the defendant surrendered himself into the custody of the governor of the prison, and an affidavit of the before-mentioned facts was put in.

ATCHERLEY, Serjt., (having conferred with TINDAL, C. J.)—I have consulted with my Lord Chief Justice TINDAL, who agrees with me in opinion,

that, as no notice of trial has been given, I have no authority at all to discharge the defendant from this indictment by putting him on his trial, so as to enable him to obtain his acquittal. Indeed, if I were to allow the trial of the defendant to come on improperly for want of due notice of trial having been given, his acquittal would not avail him; (a) but, as he has now surrendered, and is now in custody of the governor of the jail, I shall have the prosecutor and witnesses called three times to appear, prosecute, and give evidence against the defendant; and, if they do not appear, the defendant will be discharged by proclamation under the commission of jail delivery. Of course, the defendant will not be called on to give fresh recognisances. I have had a full communication with the Lord Chief Justice on this subject. If the defendant had been taken on the bench warrant and had been imprisoned on it, and never put in bail at all, I should have discharged him by proclamation if no one had appeared against him; and, as he has surrendered during the assizes, I shall order *463] him to be discharged by proclamation if the prosecutor and witnesses do not appear.

The prosecutor and witnesses were called three times and did not appear, and the defendant was then discharged by proclamation. (b)

Tyrowhitt, for the defendant.

(a) See the case of *Regina v. Hair*, ante, p. 389.

(b) See the cases of *Regina v. Minshall*, 8 C. & P. 576, and *Regina v. Hughes*, post.

OXFORD ASSIZES.

(Civil Side.)

BEFORE MR. SERJEANT ATCHERLEY.

BENCH v. MERRICK.

If a man enter into a promise of marriage in ignorance of the fact that the woman has had an illegitimate child, and discovers that before the marriage, and on that ground declines entering into the marriage, he has a right to do so, although the transaction as to the child may have taken place ten or more years ago, and the conduct of the woman may have been since perfectly correct; but, if the man knew, or had reason to know, at the time of the promise, that the woman had such a child, and gave that afterwards as his reason for refusing to marry, that would be no defence in point of law to an action for breach of promise of marriage.

BREACH of promise of marriage.—The declaration stated, that, on the 2d of February, 1843, in consideration that the plaintiff had promised to marry the defendant at a certain time then agreed upon between the plaintiff and defendant, to wit, within six months after the 30th day of January, 1843, the defendant undertook and then promised to marry the plaintiff within six months next after the said 30th day of January.—Breach, that the defendant did not marry the plaintiff within six months next after the 30th day of January, 1843, or at any time before or afterwards, but wholly *464] refused so to do.—Pleas—1st, *non assumpsit*; *2d, that at the time of the promise the plaintiff appeared to the defendant to be, and he made the promise on the faith and under the supposition that the plaintiff was, up to the time of making the promise, a woman of chaste and modest behaviour, and of correct habits of conduct, and of good character; but

that, after the making of the promise, and before the breach of it, and before the commencement of this suit, the defendant discovered that the plaintiff, before the making of the promise, had been and was a woman of unchaste and immodest behaviour, and of incorrect habits and conduct, and bad character and reputation, which said unchaste and immodest behaviour, &c., was wholly unknown to the defendant at the time of his making the promise, for which reason the defendant refused to marry the plaintiff, as he lawfully might, &c.; (concluding with a verification.)(a)

*Replication; that the defendant "of his own wrong, and without the cause by him in his said plea alleged, broke his said promise;" [*465 (concluding to the country.)

It was opened by *F. V. Lee*, for the plaintiff, that the defendant had promised to marry the plaintiff within six months after the death of Mr. Whiter, who was a relation of the defendant, who died on the 30th of January, 1843; and that, with respect to the second plea, it would be shown that the plaintiff had had a child in the year 1831, but that the defendant knew it before the making of the promise of marriage in 1843.

On the part of the plaintiff the promise of marriage was proved; and to

(a) The defendant's second plea was in the following form:—"And for a further plea in this behalf, the defendant says, that, at the time of the making of the defendant's said promise in the declaration mentioned, the plaintiff appeared to the defendant to be, and he made the said promise on the faith and under the supposition that the plaintiff had been, and was up to the time of making the said promise by the defendant, a woman of chaste and modest behaviour, and of correct habits of conduct, and of good character and reputation; but that, after the making of the said promise of the defendant in the said declaration mentioned, and before the said breach thereof, and before the commencement of this suit, to wit, on the 16th day of June, in the year of our Lord, 1843, the defendant discovered that the plaintiff, before the making of the said promise by the defendant in the declaration mentioned, had been, and was a woman of unchaste and immodest behaviour, and of incorrect habits and conduct, and of bad character and reputation, which said unchaste and immodest behaviour, and incorrect habits and conduct, and bad character and reputation of the plaintiff were wholly unknown to the defendant at the time of his making the said promise in the declaration mentioned, for which reason the defendant, at the said time when, &c., wholly declined and refused to marry the plaintiff, as he lawfully might, which is the said breach of promise in the declaration mentioned; and this the defendant is ready to verify, &c.

(Signed)

"W. J. ALEXANDER."

In the case of *Harbert v. Edgington*, tried before Baron Parke, at the Gloucester Spring Assizes, 1844, where the alleged intemperate habits of the plaintiff were set up as a defence to an action for a breach of promise of marriage, the plea was in the following form; but in that case the jury found for the plaintiff, and negatived the truth of the plea:—

"And for a further plea in this behalf, the said defendant says, that, at the time of the making of the defendant's said promise in the declaration mentioned, the plaintiff appeared to the defendant to be, and he the defendant made the said promise in the said declaration mentioned on the faith and under the belief that the plaintiff then was, a person of sober and temperate habits; and the defendant further says, that for a long time before, and up to the time when he the defendant made the said promise in the declaration mentioned, the plaintiff was not a person of sober and temperate habits, but, on the contrary thereof, had been before, and at the time of the said promise and then was, without the knowledge or suspicion of the defendant, accustomed to, and in the habit of getting drunk with wine and spirituous liquors; and the said defendant further says, that, after he the said defendant made the said promise in the declaration mentioned, to wit, on the said 8th day of June, A. D. 1843, and before he the defendant refused to marry the plaintiff, as in the said declaration mentioned, he the said defendant had obtained full information of the facts in this plea mentioned; and he further says, that the facts in this plea alleged are true, wherefore he the defendant, at the said time when, &c., in the declaration mentioned, by reason and on account of the promises in this plea mentioned, refused, and still does refuse, to marry the plaintiff, as he lawfully might, for the cause aforesaid; and this the defendant is ready to verify, &c.

(Signed)

"F. VALENTINE LEE."

*466] show that the defendant knew that the *plaintiff had had a child, it was proved by Mr. Grimes, the husband of the plaintiff's sister, who kept the Red Lion Inn at Burford, where all the parties resided, that he had heard it spoken of in his tap-room four or five times, and that as much as six or seven years ago; and it was proved by a person named Sarah Spruce, who had been his servant at the Red Lion Inn, and had left it six years ago, that while she was there the defendant asked her if she had heard that the plaintiff had had a child, to which she replied, that she had heard so.

A letter, sent by the defendant to the plaintiff in the month of June, 1843, when the plaintiff had gone from Burford to Salisbury to take leave of her friends before her marriage, was also put in. In this letter the defendant stated, that since the plaintiff had left Burford he had been informed, that the plaintiff had "concealed a certain secret" from him of which he "ought to have been informed, standing in the situation" in which he did.

The defence was, that the defendant did not know till the month of June, 1843, that the plaintiff had had a child; and to prove this, Mr. Streater, who was an auctioneer at Burford, was called. He said—"On the 16th of June, 1843, I said to the defendant, 'I suppose you are aware that Miss Bench has had a child?' He said, 'He had never heard any such thing, nor could he believe it to be true.' He appeared as if he had not heard it before. I never saw a man so affected. On the 10th of July I was passing Mr. Grimes's house, and was called in. Miss Bench said, 'she had wished her sister to inform Mr. Merrick of her situation, and that she had written three or four letters to explain her situation herself, but had not courage to send them.' She said, I had been misinformed as to the matter, as she had no child living. She said she had lived as a lady's maid, and the lady's nephew had promised her marriage, and she became in the family way, and it had been arranged, that she should receive £1000 *467] when the *child was born; but the child did not live, and she never received the £1000. On the 14th of July I told the plaintiff, that the defendant said he could never think of marrying her unless she cleared up her character; and she replied, that he ought not to be so particular, as he had kept company with several girls, whom he had deceived."

It was also proved by Mr. Andrews, a surgeon, that the plaintiff had a child in the year 1831, which did not survive its birth.

ATCHERLEY, Serjt., (in summing up.)—With respect to the first issue, the plaintiff is clearly entitled to a verdict; but, with regard to the second, which is the main issue in the cause, the rule of law is, that, if a man enters into a promise of marriage in ignorance of the fact that the woman has had an illegitimate child, and discovers that before the marriage, and on that ground declines entering into the marriage, he has a right to do so, although the transaction as to the child may have taken place at a distance of eight or ten or more years ago, and the conduct of the woman may have been since perfectly correct; but, if a man knew or had reason to believe it to be true, at the time of the promise, that the woman had had such a child, though the man afterwards gave that fact as a reason for his refusing to marry the woman, that would not be a defence in point of law. The great question in this case, therefore, will be, whether you believe, that, in the month of February, 1843, the defendant did know the history of the plaintiff in regard to this child. If he did not know it, however great a severity it may be on a woman to rake up a transaction of

bygone times, the defendant's second plea will be sustained, and on that plea the defendant will be entitled to the verdict. There is no imputation whatever on the character of the plaintiff except the transaction of 1831. If the defendant, in your opinion, has not established his defence, there will then be the question of damages; and in that case, in consequence of the misfortune (calling it by no harsher name) *in 1831, the plaintiff cannot be said to be entitled to so large a compensation as [*468 one on whose reputation no imputation had ever rested.

Verdict for the plaintiff on the first issue, and for the defendant on the second issue.(a)

F. V. Lee, and H. J. Hodgson, for the plaintiff.

Talfourd, Serjt., and W. J. Alexander, for the defendant.

(a) In the case of *Wharton v. Lewis*, 1 C. & P. 529, it was held, that, if a defendant in an action for breach of promise of marriage was induced to make the promise, or to continue the connection, by false representations, or wilful suppression of the truth as to the real state of the circumstances of the family and previous life of the plaintiff, this is a good defence to the action. And in the case of *Foot v. Hayne*, Id. 545, it was held, that, if in an action for breach of promise of marriage the defence set up is, that the defendant was induced to make the promise through misrepresentations made to him, and it is proved that the plaintiff knew that her father wrote letters to the defendant, in which he made statements respecting her, such letters are evidence for the defendant, although there is no proof that the plaintiff had read them, or was acquainted with their exact contents, but that the plaintiff would not be considered answerable for the particular expressions contained in such letters, but that a verbal representation made by the plaintiff's father (the plaintiff not being present) to a third person, who communicated it to the defendant, was not receivable in evidence.

*WORCESTER ASSIZES.

[*469]

(Civil Side.)

BEFORE MR. SERJEANT ATCHERLEY.

REGINA v. NEWTON, Esq.

An indictment for perjury, removed by certiorari, came on to be tried as a *Nisi Prius* record. As soon as the jury were sworn, the defendant asked to have the indictment read at length to the court and jury. The judge directed it to be done.

An indictment for perjury in an affidavit stated the affidavit to have been sworn "before one R. G. W., then and there being a commissioner duly authorized and empowered to take affidavits in the said county of Gloucester, in or concerning any cause depending in her said majesty's Court of Exchequer at Westminster." It was proved by Mr. R. G. W., that he had acted as a commissioner for taking affidavits in the Exchequer for ten years, but had never seen his commission; and that ten years ago he applied to his agent to procure for him a commission to take affidavits in the Exchequer, and that his agent had told him that he had done so:—*Held*, that the proof of Mr. R. G. W.'s acting as a commissioner was *prima facie* evidence that he was so.

On an application to a judge to discharge A. from custody on a *ca. sa.*, A. made an affidavit, in which he stated, that he had been previously taken in execution on the same judgment and discharged by order of the plaintiff's attorney; and that, in order to make the second arrest, the back door of his house had been broken open. A. being indicted for perjury on this affidavit, the indictment in setting out the affidavit alleged, that the defendant swore and made affidavit, that G. W., the officer who made the second arrest, "was appointed for the purpose of such occasion only, at the special instance and *part* of the said plaintiff," and that G. W. "made efforts to break the front hall-door of the said dwelling-house," and "then went round to the door of the back-kitchen of deponent's said dwelling-house, which is the *only outer-door* of the same." The affidavit itself stated, that G. W. was appointed "at the special instance and *peril* of the said plaintiff," and that G. W. went round to the door of the back kitchen of deponent's said dwelling-house, which is the *only other outer-door* of the

same." It being objected, that these were variances, the judge allowed them to be amended under the stat. 9 Geo. 4, c. 15, as neither of the assignments of perjury were at all affected by these misrecitals of the affidavits, and therefore these misrecitals could not affect the merits of the case.

PERJURY.—The *first* count of the indictment stated, that, before the making of the affidavit thereafter mentioned, to wit, on the 2d day of May, 1843, a certain judgment was signed in the Court of Exchequer in a cause in which Edward Healy was the plaintiff and the present defendant was the defendant, whereby it was considered by the said court, that the said Edward should recover a certain debt of 12*l.* 14*s.*, parcel of a certain debt of 25*l.* 8*s.*, and also 5*l.* 8*s.* 6*d.*, as well for his damages on the occasion of the detention of the debt as for his costs and charges; and that, after the signing the said judgment and before the making of the affidavit thereafter mentioned, to wit, on the 28th day of June in the year aforesaid, in the city of Gloucester, the defendant was taken and arrested by *470] the "sheriff of the same city by virtue of a writ of testatum capias ad satisfaciendum issued out of the said Court of Exchequer on the said judgment, and that the defendant was on the same day discharged out of the custody of the same sheriff. That, on the 5th day of July, in the year aforesaid, at Cheltenham, the defendant was taken and arrested by the sheriff of the county of Gloucester under a writ of capias ad satisfaciendum issued out of the Court of Exchequer upon the said judgment; and that, before and at the time of the last-mentioned arrest, the defendant was the occupier of, and did dwell and reside in, a dwelling-house situate at Cheltenham, and that there were two outer-doors to the said dwelling-house, that is to say, one outer-door at the front of the said dwelling-house, and another outer-door at the back of the said dwelling-house; and that, shortly before the last-mentioned arrest, George Wilson went to the defendant's house for the purpose of arresting the defendant under the last-mentioned writ, George Wilson then and there being duly authorized so to do; and that George Wilson entered the defendant's house, and there arrested him under the last-mentioned writ; and that the defendant was detained in custody by virtue of that writ until and at and after the making of the affidavit hereafter mentioned; and that the defendant, on the 14th day of July in the year aforesaid, at the city of Oxford, was brought up before Mr. Justice MAULE by virtue of a writ of habeas corpus, in order that he might be discharged out of the custody of the sheriff of the county of Gloucester upon the ground that the last-mentioned arrest was illegal; and that the defendant, contriving, &c., to injure Edward Healy, on the 8th day of July, in the year aforesaid, in order to procure himself to be brought up by virtue of the said habeas corpus, in order to his being discharged as aforesaid, did come "before one Richard George Whatley, then and there being a commissioner duly authorized and empowered to take affidavits in the said county of Gloucester in or concerning any cause *471] "depending in her said Majesty's said Court of Exchequer at Westminster," and did produce before the said R. G. W. a certain affidavit entitled, &c., [setting out the title of the affidavit;] and that the defendant before the said R. G. W. was duly sworn concerning the truth of the matter contained in the said affidavit; and that, "at and upon the making of the said affidavit, it then and there became and was a material question, whether, at the time when the said Augustus Newton was discharged out of custody of the said sheriff of the said city of Gloucester and county of the same city, the said Augustus Newton was discharged out of the same

custody as to the said hereinbefore first-mentioned execution by order of one James Boodle, then acting as the attorney of the said Edward Healy : and it then and there became and was a material question, at and upon the making of the said affidavit, whether, at the time when the said Augustus Newton was so discharged as aforesaid out of the custody of the said last-mentioned sheriff, the said Augustus Newton was discharged out of the same custody by order of the said James Boodle." This count of the indictment also contained averments of materiality in a similar form, as to whether, at the time when George Wilson went to the defendant's house, he made any efforts to break the front door of it ; and whether George Wilson did, with great force and violence, succeed in breaking open the outer-door at the back of the house ; and whether George Wilson succeeded in breaking away the lock fastenings of the outer-door at the back of the house ; and whether George Wilson had, while in the house, admitted that he had broken it open ; and whether George Wilson did break open the outer-door at the back of the house ; and whether George Wilson did break away the lock fastenings of that door. This count of the indictment then went on to set out the defendant's affidavit with innuendoes. That affidavit, as set out, stated, that, on the 28th day of June, 1843, the defendant was arrested by an officer of the city of Gloucester, James Boodle, the plaintiff's *attorney, personally directing [*472 the officer ; and that afterwards, on the same day, the defendant was discharged out of the custody of the said sheriff as to the said execution "by order of the said James Boodle, then acting as such attorney," (meaning as attorney for the said Edward Healy ;) and that, on the 5th of July, the defendant was at his own dwelling-house, situate within his own grounds, surrounded by a high wall and paling, when George Wilson, "who is not one of the bound officers to the sheriff of Gloucestershire, but was appointed for the purpose of such occasion only at the special instance and *part* of the said plaintiff, (meaning the said Edward Healy,) scaled the said paling ;" that the house was fastened and secure ; and that George Wilson "made efforts to break the front hall-door of the said dwelling-house, which resisted such efforts ; that he then went round to the door of the back-kitchen of deponent's (meaning the said Augustus Newton's) said dwelling-house, which is *the only outer-door* of the same, and which had been locked and well secured on the said day ;" and that by great force and violence the said George Wilson succeeded in breaking away the lock fastenings of the said door and in bursting open the said outer-door ; and that George Wilson had admitted that he had broken open the defendant's house. This count of the indictment contained assignments of perjury, that the defendant was not discharged out of the custody of the sheriff of the city of Gloucester by order of James Boodle as the attorney of Edward Healy ; that the defendant was not discharged out of the custody of the sheriff of the city of Gloucester by order of James Boodle ; that George Wilson did not make any efforts to break the outer-door at the front of the said dwelling-house ; that he did not break away the lock fastenings of the outer-door at the back of the house ; that he did not succeed in bursting open the outer-door at the back of the said dwelling-house ; and that he did not admit that he had broken open the house. This count then went on to aver, that all the said several *matters so alleged to have been [*473 falsely sworn by the said A. N. as aforesaid were, and each of them was, material for the obtaining the said writ of habeas corpus, and for the obtaining of the discharge of the said A. N. from the custody of the said

sheriff of the county of Gloucester, to wit, at," &c. And so the jurors, &c., do say, &c., (concluding in the usual form.) *Second* count like the first, but omitting that part which related to the discharge of the defendant out of the custody of the sheriff of the city of Gloucester. The *third* count charged, that the defendant falsely swore that George Wilson went round to the door of the back-kitchen of the defendant's house, "which is the *only outer-door* of the same, which had been locked and well secured all the day, and the key kept by the defendant's wife;" and that by great force and violence the said George Wilson succeeded in breaking away the lock fastenings of the said outer-door, and in bursting open the said outer-door, (thereby meaning that he the said Augustus Newton *knew of his own knowledge*, at the time of the making of the same last-mentioned affidavit, that the said George Wilson did, on the occasion aforesaid, when the said George Wilson went to the same dwelling-house as in this count aforesaid, by great force and violence succeed in breaking away the lock fastenings of the said outer-door at the back of the same dwelling-house, and in bursting open the said outer-door; and that the said George Wilson did on the same occasion break away the same fastenings and burst open the same door.) Whereas, in truth and in fact, the said Augustus Newton did not, at the time of making the said last-mentioned affidavit, or at any other time, *know of his own knowledge*, that the said George Wilson, on the same occasion last aforesaid, did by great force and violence, or in any other manner, succeed in breaking away the same lock fastenings of the same outer-door. This count contained other assignments of perjury, each stating, in a similar form, that the defendant did not at any time **474] know of his own knowledge* the matter on which the perjury was assigned. (a) The *fourth* count stated the second arrest, and that

(a) The third count of the indictment did not charge, that the defendant swore that which was *false*, but swore that which *he did not know to be true*. On this subject it is laid down by Lord Coke, 3 Inst. 166, that "the law taketh a diversity between falsehood in express words, and that it is only within this statute, [5 Eliz. c. 9.] and falsehood in knowledge or mind, which may be punished, though the words be true. For example, damages were awarded to the plaintiff in the Star Chamber, according to the value of his goods riotously taken away by the defendant. The plaintiff caused two men to swear the value of his goods that never saw nor knew them; and though that which they swore was true, yet, because they knew it not, it was a false oath in them, for which both the prosecutor and the witnesses were sentenced in the Star Chamber. *Gurneis case*, Star Chamber, Mich., 9 Jac. 1. and herewith agreeth, Bracton lib. 4, fo. 289, that a man may swear the truth and yet be perjured. Dicunt quidam verum et mentiuntur et pejerant eo quod contra mentem vadunt. Ut si Judeus juraverit Christum natum ex virgine perjurium committit quia contra mentem vadit quia non credit ita esse ut jurat."

In *Oukley and Whitleshye's case*, in K. B. 20 Jac. 1, Palmer's Rep. 294, it was resolved, that it is a misdemeanor and perjury at common law for one to swear without his knowledge, although it may be true; and in 2 Roll. Abr. 77, pl. 5, where this case is abridged, it is laid down that this is a false oath, punishable at common law, although it may not be within the statute, (5 Eliz. c. 9.) In the case of *Allen v. Westley*, in C. P., 4 Car. 1, Hetley's Rep. 97, it is stated, that, in *Syles's case*, it was agreed by the Court, "that although a witness swears the truth, yet, if it be not truth of his own knowledge, as if he shows how one revoked a will by parol, in his hearing, when the words were spoken to another in his absence, he does not swear truly, and it is a corrupt oath within the statute." But in the case of *Rex v. Hinton*, 3 Mod. 122, in K. B., 2 & 3 Jac. 2, the Court say, that "there is a difference where a man swears a thing which is true in fact, and yet he doth not know it to be so, and to swear a thing to be true which is really false; the first is perjury before God, the other is an offence of which the law takes notice."

Mr. Serjt. Russell says, (Russ. on Cr. and Misd., 1st ed., vol. 2, p. 1754; and Mr. Greaves's ed., vol. 2, p. 597,) "With respect to the falsity of the oath, it should be observed, that it has been considered not to be material, whether the fact which is sworn be in itself true or false; for howsoever the thing sworn may happen to prove agreeable to the truth or not, yet, if it were not known to be so by him who swears it, his

the defendant, in order to obtain a writ of habeas *corpus, by means whereof he might be discharged therefrom, falsely, &c., swore, that George Wilson succeeded in *breaking away the fastenings, and bursting open the back-kitchen door of his house, which was an outer-door, and then assigned perjury thereupon. [*475
[*476

offence is altogether as great as if it had been false, inasmuch as he wilfully swears, that he knows a thing to be true, which, at the same time, he knows nothing of, and impudently endeavours to induce those before whom he swears to proceed upon the credit of a deposition, which any stranger might take as well as he;" and for this the learned Serjt. cites 1 Hawk. P. C., c. 69, s. 6, [1 Curw. Hawk., b. 1, c. 27, s. 6.] and the case of *Rex v. Edwards, coram Adams, B.*, Shrewsbury Lent Assizes, 1764, and subsequently considered by the judges. (M.S.) And in the case of *Rex v. Maubey*, 6 T. R. 619, which was an indictment for a conspiracy to pervert the course of justice, by producing in evidence a false certificate of magistrates, that a road was in repair, Mr. Justice Lawrence said, "It is not necessary that the defendants should have known that the road was out of repair; they are charged with conspiring to pervert the course of justice by producing in evidence a certificate that the road was in repair; and if the charge be established in fact, it is an offence of considerable magnitude against the administration of the justice of the country. This is not unlike the case of perjury where a man swears to a particular fact, without knowing at the time whether the fact be true or false; it is as much perjury as if he knew the fact to be false, and equally indictable." We are not aware of any form of indictment in the printed collections, for perjury, in swearing that which the party did not know to be true.

The third count of the indictment, in the case here reported, was in the following form:—"And the jurors aforesaid, upon their oath aforesaid, do further present, that, before the making of the affidavit in this count mentioned, to wit, on the said 2d day of May aforesaid, in the year aforesaid, a certain other judgment was signed in her said majesty's said Court of Exchequer at Westminster aforesaid, in a certain cause wherein the said Edward Healy was plaintiff, and the said Augustus Newton defendant, whereby it was considered by the said Court of Exchequer, that the said Edward Healy should recover against the said Augustus Newton as well a certain debt as also certain damages and costs, as by the record thereof still remaining in the said Court of Exchequer at Westminster more fully appears. And the jurors aforesaid, upon their oath aforesaid, do further present, that, after the signing of the said last-mentioned judgment, and before and at the time of making of the arrest in this count mentioned, to wit, on the said 5th day of July, in the year aforesaid, at the parish of Cheltenham aforesaid, in the county of Gloucester aforesaid, the said Augustus Newton was the occupier of, and did dwell in, a certain dwelling-house there situate; and that there then and there was a certain outer-door at the back of the same dwelling-house; and that, shortly before the making of the arrest in this count mentioned, to wit, on the day and year last aforesaid, at the parish last aforesaid, in the county of Gloucester aforesaid, the said George Wilson went to the same dwelling-house for the purpose of arresting the said Augustus Newton, and did then and there arrest the said Augustus Newton in the same dwelling-house, under and by virtue of a certain other writ of our said lady the queen, commonly called a *capias ad satisfaciendum*, before then issued out of the said Court of Exchequer at Westminster aforesaid, upon the said last-mentioned judgment. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Augustus Newton was kept and detained in the said custody of the said sheriff of the said county of Gloucester, under and by virtue of the said last-mentioned writ, from the time of making of the said last-mentioned arrest, until and at and after the time of the making of the affidavit in this count hereafter mentioned, to wit, at the parish of Cheltenham aforesaid, in the county of Gloucester aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Augustus Newton, contriving and maliciously intending to injure the said Edward Healy, and to deprive him of the means of recovering the said debt, damages, and costs last aforesaid, afterwards, to wit, on the said 8th day of July, in the year aforesaid, at the common jail of the said county of Gloucester, to wit, at the North Hamlet, in the said county of Gloucester, in order to obtain a certain other writ, commonly called a habeas corpus, by means whereof he the said Augustus Newton might be discharged out of the same custody of the said sheriff of the said county of Gloucester, as to the said last-mentioned execution, on the ground that the said last-mentioned arrest was illegal, did come in his own proper person before the said Richard George Whatley, so being such commissioner as aforesaid, and did then and there, to wit, on the day and year last aforesaid, at the North Hamlet last aforesaid, in the county of Gloucester aforesaid, produce to and before the said Richard George Whatley, so being such commissioner as aforesaid, a certain other affidavit in writing of him the

*477] *This indictment had been removed into the Court of Queen's
 *478] Bench by certiorari, and came on to be tried as a *Nisi Prius
 record; and as soon as the jury were sworn, the defendant asked,
 that the whole indictment should be read at length to the court and jury.

ATCHERLEY, Serjt.—I have conferred with Lord Chief Justice TINDAL, who
 said Augustus Newton; and that the said Augustus Newton then and there, by and
 before the said Richard George Whatley, so being such commissioner as aforesaid, was
 duly sworn, and did take his corporal oath upon the holy gospel of God, of and concern-
 ing the truth of the matter contained in the same affidavit, (he the said Richard George
 Whatley then and there having sufficient and competent power and authority to ad-
 minister the same oath to the said Augustus Newton in that behalf.) And the jurors
 aforesaid, upon their oath aforesaid, do further present, that, at and upon the making
 of the same last-mentioned affidavit, it then and there became and was a material ques-
 tion, whether the said Augustus Newton *then knew of his own knowledge*, that, on the occa-
 sion when the said George Wilson so went to the same dwelling-house as in this count
 mentioned, the said George Wilson did, by great force and violence, or in any other
 manner, succeed in bursting open the said outer-door at the back of the same dwelling
 house; and that, at and upon the making of the same affidavit, it then and there became
 and was a material question, whether the said Augustus Newton *then knew of his own
 knowledge*, that the said George Wilson, on the same occasion last aforesaid, burst open
 the same door; and that, at and upon the making of the same affidavit, it then and there
 became and was a material question, whether the said Augustus Newton *then knew of his
 own knowledge*, that the said George Wilson, on the same occasion last aforesaid, did, by
 great force and violence, or in any other manner, succeed in breaking away the lock-
 fastenings of the same door; and that, at and upon the making of the same affidavit, it
 then and there became and was a material question, whether the said Augustus Newton
then knew of his own knowledge, that the said George Wilson, on the same occasion last
 aforesaid, did break away the lock-fastenings of the same door. And the jurors aforesaid,
 upon their oath aforesaid, do further present, that the said Augustus Newton, so
 being sworn as last aforesaid, not having the fear of God before his eyes, but being
 moved and seduced by the instigation of the devil, did, on the said 8th day of July, in
 the year aforesaid, at the North Hamlet aforesaid, in the county of Gloucester aforesaid,
 in and by his said affidavit last aforesaid, upon his oath last aforesaid, before the said
 Richard George Whatley, so being such commissioner as aforesaid, and having such
 competent power and authority as aforesaid, falsely, corruptly, knowingly, wilfully, and
 maliciously depose and swear, amongst other things, in substance and to the effect fol-
 lowing, that is to say, that he (meaning the said George Wilson) then went round to the
 door of the back-kitchen of this deponent's (meaning the said Augustus Newton's)
 dwelling-house, (meaning the same dwelling-house as aforesaid,) which is the only
 outer-door of the same, and had been locked and well secured all the said day, and the
 key kept by deponent's (meaning the said Augustus Newton's) said wife; and that, by
 great force and violence, the said George Wilson (meaning the said George Wilson)
 succeeded in breaking away the lock-fastenings of the said outer-door, and in bursting
 open the said outer-door; thereby meaning, that he the said Augustus Newton *knew of
 his own knowledge*, at the time of the making of the same last-mentioned affidavit, that the
 said George Wilson did, on the occasion aforesaid, when the said George Wilson went
 to the same dwelling-house, as in this count aforesaid, by great force and violence,
 succeed in breaking away the lock-fastenings of the said outer-door, at the back of the
 same dwelling-house, and in bursting open the same outer-door: and that the said
 George Wilson did, on the same occasion, break away the same fastenings, and burst
 open the same door. Whereas, in truth and in fact, the said Augustus Newton did not,
 at the time of making the said last-mentioned affidavit, or at any other time, *know of his
 own knowledge*, that the said George Wilson, on the same occasion last aforesaid, did, by
 great force and violence, or in any other manner, succeed in breaking away the same
 lock-fastenings of the same outer-door. And whereas, in truth and in fact, the said
 Augustus Newton did not, at the time of making the said last-mentioned affidavit, or at
 any other time, *know of his own knowledge*, that, on the same occasion last aforesaid,
 the said George Wilson did, by great force and violence, or in any other manner, succeed
 in bursting open the same outer-door of the same dwelling-house. And whereas, in
 truth and in fact, the said Augustus Newton did not, at the time of the making of the
 said last-mentioned affidavit, or at any other time, *know of his own knowledge*, that the said
 George Wilson, did, on the same occasion last aforesaid, break away the same fasten-
 ings of the same outer-door. And whereas, in truth and in fact, the said Augustus
 Newton did not, at the time of the making of the said last-mentioned affidavit, or at any
 other time, *know of his own knowledge*, that the said George Wilson did, on the occasion

says, that he never in his life knew this to be done ; but that, if the defendant thinks it will be of *any advantage to him to have the indictment [*479 read to the jury, it may be done.

Mr. *Ede*, the associate, read the whole of the indictment to the court and jury.

It was opened by *Godson*, for the prosecution, that, on the 2d of May, 1843, a judgment had been signed against the defendant for 12l. 14s., upon a judge's order, to which the defendant had consented ; and that, on the 28th of June, 1843, the defendant was taken in execution by an officer of the sheriff of the city of Gloucester on a writ founded on that judgment, and the defendant then claimed his privilege as a barrister attending the Gloucestershire sessions, and on his application being heard in open court at those sessions, the chairman, Mr. Serjeant Ludlow, suggested that the defendant should say, that he would take no advantage of this arrest, and should be discharged ; and the defendant thereupon signed a paper by which he undertook that the plaintiff should be still at liberty to execute the writ in the same manner as if this arrest had not taken place. On this the defendant was discharged ; and on the 5th of July, 1844, the defendant was taken at his house at Cheltenham, on another writ, directed to the sheriff of Gloucestershire, founded on the same judgment. From this second arrest the defendant wished to be discharged, and made an application to Mr. Justice MAULE for that purpose on an affidavit, in which he stated that he was discharged from the first arrest "by order of" Mr. James Boodle, then acting as the plaintiff's attorney ; and that, to effect the second arrest, the outer door of the defendant's house was broken open. Both these statements were charged by the present indictment to be false.

On the part of the prosecution, examined copies of the judgment in the case of *Healy v. Newton*, and of the writs of *capias ad satisfaciendum*, were put in.

*It was also proved by Mr. Richard George Whatley that the defendant was sworn before him to the affidavit on which the present [*480 indictment was founded ; and Mr. Whatley also stated that he acted as a commissioner for taking affidavits in the Court of Exchequer ; but in his cross-examination he said : "I never saw my commission. I desired it to be applied for through my agent, and was told by him it was granted." In his re-examination, Mr. Whatley said : "I have acted as a commissioner for taking affidavits in the Court of Exchequer ever since the year 1834. The defendant requested me to act as a commissioner on this occasion."

The defendant.—I submit that this is not sufficient proof of Mr. Whatley being a commissioner. It is stated in the indictment that Mr. Whatley is

last aforesaid, burst open the same outer-door. And the jurors aforesaid, upon their oath aforesaid, do further present, that all the said several matters and things so alleged to have been falsely sworn by the said Augustus Newton, as in this count aforesaid, were, and each of them was, material for obtaining the said last-mentioned writ of *habeas corpus*, and for obtaining the discharge of the said Augustus Newton from the said last-mentioned custody of the said sheriff of the said county of Gloucester, to wit, at the parish of Cheltenham aforesaid, in the said county of Gloucester. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said Augustus Newton, on the said 9th day of July, in the year aforesaid, at the North Hamlet aforesaid, in the county of Gloucester aforesaid, before the said Richard George Whatley, so being such commissioner as aforesaid, and so having such competent power and authority as aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in manner and form last aforesaid, did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our said lady the queen, and against the peace of our said lady the queen, her crown and dignity."

a commissioner duly authorized to take affidavits in the county of Gloucester in or concerning any cause depending in her majesty's Court of Exchequer at Westminster. His commission, if it existed, is a very special commission; and, as far as Mr. Whatley knows of his own knowledge, he has no commission at all.

ATCHERLEY, Serjt., (having conferred with TINDAL, C. J.)—I have conferred with the Lord Chief Justice, and he concurs with me in thinking that I cannot stop the cause on this objection. He thinks, and so do I, that Mr. Whatley's acting as a commissioner is *prima facie* evidence that he is so. (a)

The affidavit of the defendant was read—it was as follows:—

In the Exchequer of Pleas.

Between *Edward Healy*, plaintiff, and *Augustus Newton*, defendant.

AUGUSTUS NEWTON, of St. Paul's Cottage, Cheltenham, in the county of Gloucester, esquire, barrister-at-law, maketh oath and saith, that he is now illegally and oppressively confined a prisoner, in execution for the *debt and costs recovered *481] against him in this action, and for no other cause whatsoever, in the custody of the sheriff and keeper of the county jail of the said county of Gloucester; and that the document marked C. hereunto annexed is a copy of the warrant, by virtue of which this deponent was arrested and brought into the said custody, duly certified under the hand of the deputy governor and keeper of the said jail, wherein this deponent is now confined. And this deponent further saith, that this is an action of debt, in which the plaintiff recovered, by consent to a judge's order, the sum of 12*l.* 14*s.*, for his debt and certain costs of suit, for recovery of which certain writs of *capias ad satisfaciendum* have been issued against this deponent. And this deponent further saith, that on Wednesday, the 28th day of June last, this deponent was, in the Shire-hall in Gloucester aforesaid, arrested in execution upon the judgment signed in this cause by James Bennett, an officer to the sheriff of the city of Gloucester, upon a warrant of *capias ad satisfaciendum*, made by him to the said James Bennett; and James Boodle, the plaintiff's attorney in this cause, himself personally directed the said officer in making and effecting the said arrest. And this deponent further saith, that afterwards, on the same day, he was discharged out of custody of the said sheriff, as to the said execution, by order of the said James Boodle, then acting as such attorney. And this deponent further saith, that on Wednesday last, the 5th day of July instant, at about one of the clock in the afternoon, he, the said Augustus Newton, was in his own dwelling-house, of which he was then the sole tenant at will, called St. Paul's Cottage, aforesaid, situate within his own grounds, surrounded by a high wall and paling, when George Wilson, the person mentioned in the annexed copy warrant, who is not one of the bound officers of the sheriff of Gloucestershire, but was appointed for the purpose of such occasion only, at the special instance and *peril* of the said plaintiff, scaled the said paling with two assistants, with a pistol in hand, which this deponent is informed and verily believes was then loaded with powder and three slugs, for the purpose of assassinating this deponent if opportunity had offered. And this deponent further saith, that his said house was in every part then perfectly fast and secure; that there are two outer-doors to the same, both of which were well secured, this deponent being apprehensive of an arrest for debt, and confining himself to his said dwelling-house on that account. And this deponent further saith, that the said George Wilson demanded admittance, as he said, to execute a warrant against this deponent, which demand was refused by this deponent's wife, Lætitia Francis Newton; that the said George Wilson then said, "I will break in if you do not let me in." That admittance was still peremptorily refused by order of this deponent; that then the said George Wilson renewed his threats, and made efforts to break the front hall-door of the said dwelling-house, which resisted such efforts; that he then went round to the door of the back-kitchen of deponent's said dwelling-house, which is the *only other outer-door* of the same, and which had been locked and well secured all the said day, and the key kept by deponent's said wife; and that, by great force and violence, the said George Wilson succeeded in breaking away *the lock fastenings of the said door, and in bursting open the said outer-door; *482] that he entered the said house through the same, passed through the intermediate rooms and passages, and arrested this deponent in the hall of the said dwelling-house. That deponent then admitted three police officers, who had been sent for and were there for Mrs. Newton's protection, and in their presence this deponent demanded

(a) See the case of *Regina v. Murphy*, 8 C. & P. 297.

the warrant by virtue of which his house had been broken into as aforesaid, whereupon the said George Wilson produced and read a warrant, of which a copy is hereunto annexed, marked C., and admitted that he had broken open the deponent's house for the purpose of executing the same, as, he said, the police often did to execute their warrants, and he should do the same, for the sheriff had been indemnified, and he, the said George Wilson, was acting by the orders of his employer in breaking into deponent's house, and if he did wrong deponent had his remedy. And this deponent further saith, that the said George Wilson then by force placed this deponent in a close carriage, and conveyed him to the county jail aforesaid; but, before they left the house of deponent, the said George Wilson, in answer to this deponent, declared, that he could not take the money mentioned in the said warrant, but that his orders were to carry this deponent to jail at once; and, before entering the same, the said George Wilson remarked, that those who employed him would hang this deponent if they could. And this deponent further saith, that the two said several arrests in execution of him this deponent, the one by the said sheriff of the city of Gloucester, and the other by the said George Wilson, the plaintiff's specially appointed officer to the sheriff of the said county of Gloucester, were both made by order of the plaintiff's said attorney James Boodle; and that, as to the first arrest in execution, deponent was discharged out of custody by direction of the plaintiff's said attorney given to the said sheriff's officer in the presence of this deponent; and that there never was more than the said debt and the one judgment between this deponent and the plaintiff. And this deponent further saith, that he is a barrister-at-law, of the Oxford circuit, and will suffer the greatest injury in his professional character and employment by further detention in his said confinement, illegal and oppressive as it is; and that he is anxious to join the circuit at Abingdon.

(Signed) AUG. NEWTON.

Sworn at the common jail, at Gloucester, in the county of Gloucester, this 8th day of July, 1843, before me,

R. G. WHATELY.

A Commissioner, &c.

The defendant.—There are two variances between the affidavit and the setting it out in the indictment. In the indictment it is stated to have been sworn in the affidavit, that George Wilson went round to the back-door of the house, "which is the *only* outer-door of the same." In the affidavit itself it is, "which is the *only other* outer-door of the same." In the case of *Rex v. Spencer*, 1 C. & P. 260, it was held, [*483 that, in reciting a bill in Chancery in an indictment for perjury, the insertion of the word "houses" instead of the word "house" was a fatal variance.

Godson.—There is no assignment of perjury on those parts of the affidavit, and the variances are, therefore, amendable under the stat: 9 Geo. 4, c. 15.

ATCHERLEY, Serjt.—The case cited by Mr. Newton was, I believe, one of those which caused the passing of that act of Parliament.

The defendant.—In the case of *Rex v. Cooke*, 7 C. & P. 559, an indictment for perjury, assigned on an affidavit made for the purpose of setting aside a judgment, signed since the rule of Hilary Term, 4 Will. 4, alleged, that the judgment was entered up "in or as of" Trinity Term, 5 Will. 4; and it was held bad on the ground that a judgment is now of the day on which it is signed; and Mr. Justice PATTESON would not in that case allow any amendment; and his lordship said, that amendments should be made very sparingly in criminal cases.

ATCHERLEY, Serjt.—If the variance between the affidavit and the recital of it on the record had related to any assignment of perjury, I should not have made the amendment, as it might have misled the defendant; but, as there is no assignment of perjury on that part of the affidavit, the amendment cannot affect the merits of the case in any way; and I shall, therefore, allow the amendment to be made.

The defendant.—In the recital of the affidavit in the indictment, it is

*484] stated, that the officer George Wilson was "not one of the bound officers of the sheriff of Gloucestershire, but was appointed "at the special instance and part of the plaintiff." In the affidavit itself, the words are, "at the special instance and *peril* of the plaintiff."

ATCHERLEY, Serjt.—I shall allow that to be amended.

To disprove that part of the affidavit which stated that the defendant was discharged by order of the plaintiff's attorney, Mr. James Boodle was called. He said, "I was the attorney for the plaintiff in an action, *Healy v. Newton*. I was in court at Gloucester at the quarter sessions on the 28th of June, 1843. Mr. Serjeant Ludlow presided. The defendant was not discharged out of the custody of the sheriff of the city of Gloucester by any order of mine. I told the sheriff's officer, that I should not bring any action against the sheriff if he let the defendant go, but that was after the defendant had signed a paper. Before the paper was signed, I had never consented to the defendant's discharge. Mr. Serjeant Ludlow said, he should recommend the defendant's privilege to be allowed, he having applied for his privilege as attending the sessions as counsel; but he said, he could make no order. The paper was then made out and signed by the defendant.

The paper was read in evidence, and was as follows:—

HEALY v. NEWTON.

I HEREBY undertake not to bring any action in respect of any arrest in the said action made this morning against any person or persons; and I hereby undertake, that the plaintiff in the said action shall be at liberty to execute, or cause to be executed, the said writ, in the same manner as if no such arrest had taken place; and that the case shall in all respects be considered as if in point of fact no such arrest had so taken place as aforesaid.

AUG. NEWTON, 28th June, 1843.

ATCHERLEY, Serjt.—I have asked the Lord Chief Justice TINDAL his opinion upon this part of the case, and I should wish to hear how this part of the charge is proposed to be supported.

*485] *Godson*.—The object of the affidavit was to convince Mr. Justice MAULE that the defendant had been discharged from the first arrest by order of the plaintiff's attorney; and that, therefore, the second arrest was bad. Now, this paper is signed that the first arrest should go for nothing. The words used by the attorney to the officer could not operate in the mind of the defendant, because he knew that by this paper the first arrest was to go for nothing; and it will be for the jury to say whether the defendant did not know that he was discharged from the first arrest in consequence of having signed this paper.

Greaves, (on the same side.)—Lord Coke says, (a) "By the ancient law of England, in all oaths, equivocation is utterly condemned; for Britton saith, (b) Serement est honest et leall quant sa conscience demesne accord a chescun point a la bouche ne pluiss ne meins et sil ad discord donques est perillous." "Perjuri sunt qui servatis verbis juramenti decipiunt aures eorum qui accipiunt. If equivocation should be permitted, tending to the subversion of truth, it would shake the foundation of justice." I submit that this is at all events a case of equivocation, and is, therefore, within those authorities.

In answer to further questions, Mr. Boodle said, "I believe that the defendant could hear what I said to the officer. When the defendant was before Mr. Justice MAULE, he put in the affidavit sworn on the 8th of July,

1843, and applied for his discharge on the ground that he had been arrested before, and discharged by me as attorney for the plaintiff; and, also, because his door had been broken open. I produced the paper signed by the defendant. Mr. Justice MAULE said, 'Did you sign this paper before you were set at liberty?' And the defendant said that he did, but it made no difference. The judge said it made all the difference, and that, if the court at the sessions had discharged *the defendant on his privilege, his privilege would have been properly allowed; [*486 but that the paper was an answer to the first ground for the discharge."

It was proved by James Bennett, an officer of the sheriff of the city of Gloucester, that he arrested the defendant on the 28th of June, 1843, under the first writ; and this witness further said: "After the document was signed by Mr. Newton, Mr. Boodle said to me, 'No action shall be brought against the sheriff.' I then let Mr. Newton go. My reason for letting him go was, what Mr. Boodle said to me; if he had not said it, I would not have let Mr. Newton go. Mr. Boodle being the plaintiff's attorney, I thought that what he said authorized me to discharge Mr. Newton."

ATCHERLEY, Serjt.—It now appears that the defendant was in custody, and would have been detained but for what passed between Mr. Boodle and the officer; this the defendant hears, and on that communication he was discharged. His affidavit states that he was discharged by order of the attorney. It would have been better if the affidavit had stated the whole matter; but I am of opinion, that the charge of perjury cannot be supported on this part of the case; and, in that view of the case, the Lord Chief Justice TINDAL agrees with me, and I shall, therefore, tell the jury so.

With respect to that part of the affidavit that related to the alleged breaking open of the defendant's door, George Wilson was called. He swore that he did not break open the door, but that the defendant at the instant and throughout insisted that he had done so. That he (Wilson) then said, "Well, you may say so if you like, and you know where to seek your remedy;" and that, upon a policeman coming in, the defendant said, "This man broke open my door," on which he (Wilson) replied, "Well, I have acknowledged before that I did, and you may seek your remedy." Wilson, however, swore on the present trial that, *though he had used [*487 these words at the time, yet that, in fact, he did not break open the door.

ATCHERLEY, Serjt.—I shall leave it to the jury to say, even assuming that the door was not broken open, whether Mr. Newton might not have been under the bona fide impression that it had been, as he at the moment charged the officer with having broken open the door, and persisted in that charge.

His lordship re-stated this question to the jury.

Verdict—Not guilty.

Godson and Greaves, for the prosecution.

The defendant in person.

DOE, on the several demises of BLAYNEY and Others, v. SAVAGE and Another.

T. occupied lands from 1790 to 1815, but had ceased to occupy them before the time of his death. At T.'s death, among his papers were found a series of receipts for the rent of this land from 1790 to 1804, signed by M. P., sen., who died in 1806, and a similar series of receipts for rent from 1806 to 1815, signed by M. P., jun., (the daughter of M. P., sen.,) who died in 1826:—*Held*, in ejectment for these lands, that these receipts were receivable as evidence of the seisin of M. P., sen., and M. P., jun. An examined copy of an entry in a parish register of marriages is receivable in evidence to prove a marriage, although the entry in the register purport to be attested by one witness only, the words "In the presence of" in the entry being followed by one name only.

EJECTMENT to recover lands at North Piddle.

It was opened by *Whateley*, for the lessors of the plaintiff, that the lands in question had been bought of Nicholas Geary by William Phillips the elder, in the year 1777, who in the same year devised them to his widow, Mary Phillips the elder, in fee. William Phillips the elder died in 1782, and his widow, Mary Phillips the elder, by her will made in 1804, devised the property to her son John and Mr. Thomas Blayney in fee, in trust to *488] sell it and divide the *proceeds between her daughter, Mary Phillips the younger, and Ann Smith, widow. Mary Phillips the elder died in 1806, John Phillips in 1808, and Mr. Blayney, the other trustee, in 1838; and, no sale of the property having taken place, Mary Phillips the younger received the rents of the property till her death in 1826; one of the demises in the declaration being that of Mr. Robert Blayney, the heir of Mr. Blayney the trustee. The defendants claimed under a deed of the year 1791, alleged to have been executed by Mary Phillips the elder, by which, if the deed were genuine and valid, she had divested herself entirely of this property; however, possession had never gone under this deed, and it was imputed that the deed was a forgery.

On the part of the plaintiff, deeds of lease and release, dated the 24th and 25th of January, 1777, by which Nicholas Geary conveyed lands at North Piddle to William Phillips the elder, were put in, as were the will of William Phillips the elder, dated March 19th, 1777, and that of Mary Phillips the elder, April 17th, 1804; and it was proved, that William Phillips the elder died in 1782, and Mary Phillips the elder in 1806.

To prove the marriage of William Phillips, the son of William and Mary Phillips the elder, in support of one of the demises in the declaration by the heir of William Phillips the son, an examined extract from the register-book of marriages of the parish of All Saints, Evesham, was offered in evidence: it was in the following form:—

"The year 1804. William Phillips, of the parish of Great Hampton, and Sarah Taylor, of Saint Lawrence, were married in this church by license the 2d day of February, in the year of our Lord one thousand eight hundred and four, by me, E. COOPER.

"This marriage was solemnized } WILLIAM PHILLIPS,
between us, } SARAH TAYLOR,

"In the presence of JAMES TAYLOR."

Godson, for the defendant.—I submit that this copy of the All Saints' register is not receivable in evidence. By *sect. 15 of the Marriage Act, 26 Geo. 2, c. 33, it is enacted, that "all marriages shall be

solemnized in the presence of *two* or more credible witnesses besides the minister who shall celebrate the same ; and that, immediately after the celebration of every marriage, an entry thereof shall be made in such register to be kept as aforesaid," (that is, in books which are described in the 14th section of the act,) "in which entry or registry it shall be expressed, that the said marriage was celebrated by banns or license ; and if both or either of the parties married by license be under age, with consent of the parents or guardians, as the case shall be, and shall be signed by the minister, with his proper addition, and also by the parties married, *and attested by such two witnesses*, which entry shall be in the form or to the effect following." The form of entry is then set out, and it concludes, "In the presence of E. F., G. H." clearly importing that two witnesses must sign the attestation in the register-book. Here the register purports to be signed by one witness only, and the register imports that the marriage was solemnized in the presence of one witness, and no more ; and although it may be that the marriage is a valid marriage notwithstanding this defect in the registration of it, yet I submit, that this register, not being in conformity with the act of Parliament under which it was made, is not receivable in evidence.

Whateley, for the lessors of the plaintiff.—To perpetuate the evidence of marriages, it is directed by the stat. 26 Geo. 2, c. 33, that the register shall be in a particular form, and the statute is merely directory as to the form ; (a) and a public document may always be given in evidence by proof of an examined copy of it.

* *W. J. Alexander*, on the same side.—A marriage may be proved in various ways. It may be proved by some one who was present [490 at it.

Godson.—If a register attested by one witness is receivable as evidence of a marriage, so would a register not attested by any witness at all, and without the signatures of the minister and parties.

ATCHERLEY, Serjt.—I shall receive the evidence.

The evidence was received.

With a view of showing the seisin of Mary Phillips, and that she was in the receipt of the rents of the property from the year 1790 to the year 1804, *Whateley*, for the lessors of the plaintiff, proposed to put in a series of receipts for rent signed by Mary Phillips from 1790 to 1804. It was proved, that Mr. Joseph Tansell (who was dead) was in the occupation of the property in question from the year 1790 to the year 1815 ; and it was also proved by his nephew Mr. John Tansell, that, on the death of Mr. Joseph Tansell, these receipts (which purported to have been given half-yearly) were found among his papers. Mr. Joseph Tansell had ceased to be tenant of the property before the time of his death.

Talfourd, Serjt., for the defendants.—I apprehend that receipts for rent by a deceased person, who does not by those receipts charge himself to any other person, (as a steward does to his employer,) are not receivable in evidence. This sort of evidence was attempted in the case of *Davies v. Lowndes*, but was not received.

Whateley.—We have put in the will of William Phillips, who devised this property to Mary Phillips in fee ; and these receipts are admissions by

(a) The preamble to the 15th section of the stat. 26 Geo. 2, c. 33, is, "And in order to preserve the evidence of marriages, and to make the proof thereof more certain and easy, and for the direction of ministers in the celebration of marriages and registering thereof, be it enacted," &c.

*491] Mary Phillips that the *rent was paid. In the case of *Doe d. Lloyd v. Passingham*, a receipt for rent given by Gwin Lloyd was offered in evidence, and objected to by the present Lord LYNDBURST, not on the ground that it was not receivable in evidence, but because it was not stamped, his lordship not at that moment recollecting that the receipt tax was not imposed at the time that receipt was written.

W. J. Alexander, on the same side.—These receipts are found in the hands of Tansell the tenant, and are, therefore, receivable as admissions by Mary Phillips against her interest.

J. W. Smith, on the same side. In actions on bonds more than twenty years old, it has been a question, whether endorsements of payments of interest by a deceased obligee are receivable as evidence to take the case out of the statute of limitations.

ATCHERLEY, Serjt.—It must be shown when such endorsements were made, or they may have been only endorsements made by the obligee in his own favour, in order to prevent the statute of limitations from being a bar to the action.

J. W. Smith.—These receipts are proved to have been brought from the custody of Tansell the tenant, and a statement by Mary Phillips, kept in the possession of Tansell, is certainly evidence to go to the jury that Tansell admitted its truth.

ATCHERLEY, Serjt.—You put it not only on the ground that these are admissions by Mary Phillips; but they are admissions by Tansell the tenant also.

J. W. Smith.—As Tansell was in the possession of the land, his admission as to the seisin, either by parol or *writing, would be *492] receivable in evidence. So, I submit, that his keeping these documents is a recognition of them. The question at present is not as to the weight of the evidence, but as to its admissibility.

ATCHERLEY, Serjt., said that he thought the receipts were admissible, but that he would consult the Lord Chief Justice TINDAL, and, having done so, said: "I have conferred with the Lord Chief Justice, and he also thinks that these receipts are receivable in evidence, on the ground that they are produced from the custody of the tenant; and that, as they are produced from the custody of the tenant, this could not have been a making of evidence by Mary Phillips in her own favour. If these receipts had come from the custody of Mary Phillips, they might not have been receivable in evidence."

The receipts were read in evidence, as were receipts produced under precisely similar circumstances, which were signed by Mary Phillips the younger, and were for rent from 1809 to 1815.

A notice to quit the property,—dated the 21st of March, 1808, signed by Mary Phillips and Ann Smith, addressed to Mr. Joseph Tansell,—and a lease of the property for three years to Mr. Joseph Tansell, purporting to have been made to him in April, 1808, by Mary Phillips the younger and Ann Smith, but executed by the latter and Mr. Joseph Tansell only,—found among his papers at his death by his nephew, were offered in evidence.

ATCHERLEY, Serjt.—These fall within the same rule as the receipts.

The notice to quit and lease were given in evidence.

The defence was, that, in the year 1791, Mary Phillips the elder had *493] conveyed away the property in question by *a deed, and, if that deed was a genuine and valid deed, it was conceded that the property belonged to the defendants, and not to any of the lessors of the plain-

tiff; and evidence was also given to show that William Phillips the elder had bought only a part of the property from Nicholas Geary, and that, with respect to the residue of it, the legal estate was in the trustee of an out-standing term, who was not one of the lessors of the plaintiff.

In reply, it was contended, that Mary Phillips, when she executed the deed of 1791, had been imposed upon, and had executed the deed believing it be a deed for some other purpose.

The jury were of that opinion, and found a

Verdict for the plaintiffs.

Whateley, W. J. Alexander, and J. W. Smith, for the plaintiffs.

Talfourd, Serjt., Godson, and John Gray, for the defendants.

In the ensuing term, *Talfourd*, Serjt., applied to the Court of Queen's Bench for a rule to restrict the verdict to a part of the property only, or for a new trial on grounds not at all affecting the points of law above reported. The court granted a rule to show cause.

*(*Crown Side.*)

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BEFORE LORD CHIEF JUSTICE TINDAL.

REGINA v. THOMAS COX.

AN indictment for larceny, which charges that the prisoner stole "*three eggs, of the value of twopence, of the goods and chattels of S. H.,*" is bad, for not stating the species of eggs, because it does not show that the eggs stolen might not be such as are not the subject of larceny.

LARCENY.—The prisoner was indicted for stealing "*three eggs, of the value of twopence, of the goods and chattels of Samuel Harris.*"

The eggs stolen were the eggs of a guinea-fowl.

TINDAL, C. J.—The indictment is insufficient. It should have stated what sort of eggs were stolen. For aught that appears on this indictment, the eggs stolen might have been adder's eggs, or some other species of eggs which cannot be the subject of larceny.

His lordship directed an acquittal.

Verdict—Not guilty.(a)

Huddleston, for the prosecution.

(a) See the case of *Reg. v. Allen*, post, p. 495.

REGINA v. JOHN SILLS, GEORGE FELLOWS, and JAMES JOHNSON.

A. and B. were indicted for burglary and stealing. A part of the stolen property was found in the house of each of the prisoners:—*Held*, that the wife of A. was a competent witness to prove that she took to B.'s house the stolen property that was found there.

BURGLARY.—The prisoners were indicted for having, on the 8th of March, 1844, burglariously broken and entered the dwelling-house of Anne Wilks, situate at Yardley, and stolen therein cloaks, necklaces, workboxes, and other articles.

*Evidence was given to show that a part of the stolen property was found in the house of each of the prisoners [*495

Huddleston, for the prisoners, proposed to call the wife of the prisoner Sills, as a witness for the prisoner Fellows, to prove that she brought to Fellows's house that part of the stolen property which was found there.

TINDAL, C. J.—I think she is a competent witness for that purpose.

The witness was examined.

The jury found the prisoners Guilty.

W. A. Hill, for the prosecution.

Huddleston, for the prisoners.

REGINA v. WILLIAM ALLEN.

An indictment for bestiality, which describes the animal as "a certain animal called a bitch," is sufficiently certain, although the females of foxes and some other animals are called bitches, as well as the female of the dog.

MISDEMEANOR.—The indictment charged, that the defendant, on, &c., at, &c., "in and upon a certain animal called a bitch, unlawfully and wickedly did lay his hands," with intent feloniously to commit bestiality "with the said animal, and then and there unlawfully and wickedly did attempt feloniously, &c., carnally to know the said animal," &c.

Huddleston, for the defendant.—I submit that this indictment is bad, on the ground that it does not describe the animal with sufficient certainty. In the case of *Regina v. Cox*, (ante, p. 494,) your lordship held, that, in *496] an indictment for *stealing eggs, the description "three eggs" was not sufficient, without stating what species of eggs they were. So, here, the term "bitch" may mean a female dog, or it may be a bitch fox, a bitch otter, or the bitch of some other animal; and all indictments should be certain, so as to enable a prisoner to plead autrefois acquit.

TINDAL, C. J.—I think this indictment quite sufficient, and that the description of the animal is sufficient. In the case of *Regina v. Cox* the eggs stolen might (consistently with every thing that was stated in the indictment) have been the eggs of some animal, the eggs of which could not be the subject of larceny.

Huddleston addressed the jury for the defendant.

Verdict—Not guilty.

Beaton, for the prosecution.

Huddleston, for the defendant.

REGINA v. JOSEPH DAVID MARCH and MARY BRANSTON.

M. was delivered of a child at the house at which A. and B. resided, they telling her that the child was to be taken to an institution to be nursed. A. and B. took the child from the house, and put it into a bag, and hung the bag with the child in it on some park-palings at the side of a foot-path, and there left it:—*Held*, that this was an assault on the child.

ATTEMPT to murder.—The first count of the indictment charged, that the defendants "in and upon a certain male child of one Anne Milne, of tender age, to wit, of the age of forty-eight hours, and not named," did make an assault, and that they placed the child in a bag, and suspended the bag from certain pales, and left the child exposed to the inclemency of the weather, and thereby attempted to murder the child. The *second* count was *similar, but charged an attempt to murder the child by starvation. *497] The *third* count charged the placing of the child in the bag,

and hanging the bag on the pales, as an assault ;(a) and the *fourth* count was for a common assault. **Fifth, sixth, seventh, and eighth* counts, [498 like the first four, except that the child was described as "a certain child of the said Anne Milne, of tender age, to wit, of the age of forty-eight hours, whose name is to the jurors aforesaid unknown." *Ninth, tenth, eleventh, and twelfth* counts, exactly similar to the fifth, sixth, seventh, and eighth, but omitting the words "of the said Anne Milne."

It appeared that the defendant March resided in High-street, Bordesley, near Birmingham, and dispensed medicines, and also practised as a surgeon, the other defendant living with him ; and that Anne Milne, who came to the defendant March's house for her accouchement, was, on Saturday, the 18th of May, 1844, delivered of a male child, which the defendants told her was to be taken to a nursery or institution to be brought up. It further appeared, that at about two o'clock in the afternoon on Monday, the 20th of May, 1844, the defendants left their home with the child, and were seen by a witness named Dingley, at between two and three o'clock on the same afternoon, passing along a foot-path leading from the Alcester

(a) The first count of the indictment was in the following form :—

"Worcestershire, } The jurors for our lady the queen upon their oath present, that
to wit. } Joseph David March, late of the parish of Kingsnorton, in the county
of Worcester, surgeon, and Mary Branton, late of the same place, single woman, on
the 20th day of May, 1844, with force and arms, at the parish aforesaid, in the county
aforesaid, in and upon a certain male child of one Anne Milne, of tender age, to wit,
of the age of forty-eight hours, and not named, in the peace of God and our said lady
the queen, then and there being, unlawfully did make an assault,* and that the said
Joseph David March and Mary Branton then and there unlawfully did put and place
the said male child in a certain bag, and the said male child, so put and placed in the
said bag, did then and there unlawfully suspend and place on certain pales, then fixed
and being in a certain public road and highway there, and then and there did unlaw-
fully and inhumanly leave, abandon, and expose the said child to the cold and inclemency
of the weather without sufficient and proper clothing to cover and protect the
body of the said child with intent him the said male child, thereby then and there feloniously,
wilfully, and of their malice aforethought, to kill and murder ; and did thereby
then and there unlawfully and inhumanly attempt and endeavour the said male child
then and there feloniously, wilfully, and of their malice aforethought, to kill and murder,
against the form of the statute in such case made and provided, and against the peace
of our said lady the queen, her crown and dignity."

The second count was exactly similar to the first count to the asterisk, and then proceeded as follows :—

"And that the said Joseph David March and Mary Branton, then and there having the said male child in their custody, power, and possession, and then and there wickedly contriving to deprive the said child of his life by starvation and the want of food and nourishment necessary for the sustenance and support of the body of the said child, did then and there unlawfully and inhumanly put, place, leave, abandon, and expose the said child in a certain open and public highway there, (the said child being then and there unable to protect or take care of himself,) with intent thereby then and there feloniously, wilfully, and of their malice aforethought, to kill and murder the said child, and did thereby then and there unlawfully and inhumanly attempt and endeavour the said male child then and there feloniously, wilfully, and of their malice aforethought, to kill and murder, against the form of the statute in such case made and provided, and against the peace of our said lady the queen, her crown and dignity."

The third count was precisely similar to the first count to the asterisk, and then proceeded as follows :—

"And that the said Joseph David March and Mary Branton with their hands then and there did put and place the said child in a certain bag, and did then and there suspend and hang the said bag with the said child therein as aforesaid on certain pales, then fixed and being in a certain public highway there, and did then and there unlawfully and inhumanly leave, desert, and abandon the said child, so being in the said bag, hanging on the said pales as aforesaid, in the highway there, the said male child being of such tender age as aforesaid, and unable to take care of himself, to the manifest danger of the life of the said male child, and against the peace of our said lady the queen, her crown and dignity."

turnpike-road, by the side of Moseley-park, to Edgbaston-lane, and that soon after that, this witness saw hung from the paling at the side of the foot-path a coarse linen bag, about two feet deep, and fifteen inches wide, which hung upon one of the pales by two holes made in the upper part of *499] the bag. This bag contained a child, and some pieces of old cloth, which had formed part of a coat. It was proved by a superintendent of police, named Griffiths, that he took the defendant March into custody on the same afternoon, when the defendant March stated that he gave the child to a woman named Vincent, who lived in Red Lion yard, and was a midwife, and that she was to take it to be dry-nursed to some hospital; but the superintendent of police stated that no such person could be found. Evidence was also given to show that the bag in which the child was, belonged to the defendant March, and that pieces of cloth corresponding with those found with the child were found in his house. It was further proved by Mr. Kimberley, a surgeon, that, in his opinion, the putting a child of so tender age into a bag, and then hanging the bag on pales, would be likely to cause the death of the child.

Huddleston, for the defendants.—With respect to the third and fourth counts, I submit, that, if there was consent to what was done, there could be no assault; as the child was of so tender age, the consent of its mother might be necessary, but here the defendants had possession of the child by the consent of the mother.

TINDAL, C. J.—The mother gave that consent on the false pretext that the child was to be taken to some institution; and as that pretext was false, it was really no consent.

Keating, for the prosecution.—I do not understand your lordship to decide, that, if the mother had consented to all that was done, there would have been no assault on the child.

TINDAL, C. J.—I have not said that. All that I have said is, that there is no evidence of any consent on the part of the mother.

*500] *Huddleston* addressed the jury for the defendants, and argued that there was no sufficient proof of any intention to murder, so as to support the first and second counts.(a)

TINDAL, C. J., (in summing up).—The defendants are charged with having assaulted this child, and in the first and second counts an intent to murder is laid. I much incline to think that an intent to murder cannot be fairly inferred here; for if there had been an intention in the prisoners to have murdered this child, a very little difference in the mode of packing up the bag would have carried that intention into effect. With respect to the third and fourth counts, there is no real difference in the charges contained in them, and the taking of the child and putting it into a bag was an assault. The case, therefore, resolves itself into this question, whether the defendants are the persons who did take this child and put it into the bag, and hang it on the palings; but I think you may acquit them on all those counts which charge an intent to murder.

The jury found both the defendants guilty on the third and fourth counts of the indictment, and Not guilty of the residue of the charge.

Keating and *Spooner*, for the prosecution.

Huddleston, for the prisoners.

(a) See the case of *Regina v. Walters, C. & Mar.* 164.

REGINA v. BOWEN.

[*501]

A count in an indictment on the stat. 1 Will. 4, c. 66, s. 20, which charges that the prisoner "*feloniously and wilfully did destroy, deface, and injure*" a parish register, is not bad for duplicity, and it is not necessary in such a count to allege a *scienter*.

The tearing off a part of a leaf of a parish register-book, on which part of the leaf is written entries of baptisms, &c., by which tearing the portion of the leaf torn off is entirely detached from the book, is a felony within the stat. 1 Will. 4, c. 66, s. 20, although the portion of the leaf thus torn off be afterwards pasted into the book, so that all the entries are as legible as before.

Whether, in a case of felony not capital, a judgment against a prisoner on a demurrer to the indictment is conclusive against him, as in misdemeanor, and whether the prisoner being tried for the felony after a judgment against him on demurrer is confined to capital cases—*quære?*

INDICTMENT on the stat. 11 Geo. 4, & 1 Will. 4, c. 66, s. 20.(a) The first count of the indictment was in the following form:—

"The jurors for our lady the queen upon their oath present, that John Bowen, late of the parish of Pirton, in the county of Worcester, labourer, on the 31st day of July, A. D. 1843, with force and arms, at the parish of Pirton aforesaid, in the county aforesaid, feloniously and wilfully did *destroy, deface, and injure [a certain register of baptisms, marriages, and burials, to wit, the register of baptisms, marriages, and burials of the parish of Croome d'Abitot, in the said county of Worcester,] which said register then, to wit, before and at the time of the destroying, defacing, and injuring thereof as aforesaid, was there, to wit, at the parish of Pirton aforesaid, in the county aforesaid, kept by and in the custody of the Rev. William Lister Isaac, clerk, then and there being the rector of the said parish of Croome d'Abitot, against the form of the statute in such case made and provided," &c. The *second* count was precisely similar to the first, except that, instead of the words between the brackets, were the following: "a certain part, to wit, one leaf of a certain register of baptisms, marriages, and burials, to wit, of the register of baptisms, marriages, and burials of the parish of Croome d'Abitot aforesaid, in the county aforesaid." *Third* and *fourth* counts, similar to the first and second, but stating the register to be "kept by and in the custody of the Rev. Henry Cornelius Hart, clerk, then and there being curate of the said parish of Croome d'Abitot." *Fifth* and *sixth* counts, like the first and second, but stating the register to be "kept by and in the custody of the then officiating minister of the said parish of Croome d'Abitot." The indictment contained six similar counts stating the register to be a register of baptisms,

(a) By which it is enacted, "That, if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any register of baptisms, marriages, or burials, which hath been or shall be made or kept by the rector, vicar, curate, or officiating minister of any parish, district parish, or chapelry, in England, any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, in any such register, any entry of any matter relating to any baptism, marriage, or burial, or shall utter any writing as and for a copy of an entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such writing to be false, forged, or altered, or if any person shall utter any entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such entry to be false, forged, or altered, or shall utter any copy of such entry, knowing such entry to be false, forged, or altered, or shall wilfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any such register, or any part thereof, or shall forge or alter, or shall utter, knowing the same to be forged or altered, any license of marriage, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years."

six similar counts stating it to be a register of marriages, and six similar counts stating it to be a register of burials.

When the prisoner was called upon to plead to this indictment, *F. V. Lee*, for the prisoner, proposed to demur specially to it. (a)

*503] *TINDAL, C. J.—This is not a capital case; you therefore may be bound by your demurrer, and may not be allowed to plead over.

(a) The demurrer was in the following form:—"And the said John Bowen, in his own proper person, cometh into court here, and having heard the said indictment read, saith, that the said indictment, and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law; and that he the said John Bowen is not bound by law to answer the same. And the said John Bowen says, that the said indictment, and each and every count thereof, is insufficient, among other things, in this, to wit, that the said John Bowen is in each and every count of the said indictment indicted for and charged with more than one offence, in that each and every count of the said indictment charges the said John Bowen with destroying, and also with injuring, and also with defacing the respective register, or part of a register therein mentioned; and in that the said indictment is otherwise informal and defective: and this he is ready to verify. Therefore, for want of a sufficient indictment in this behalf, the said John Bowen prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified."

"(Signed) E. YARDLEY."

In Arch. Cr. Pl., p. 53, it is said. "In civil actions the usual mode of objecting to pleadings for duplicity is by special demurrer; it is cured by general demurrer, or by the defendant's pleading error. In criminal cases the defendant may object to it by special demurrer, perhaps, upon a general demurrer; or the court in general, upon application, will quash the indictment; but it is extremely doubtful if it can be made the subject of a motion in arrest of judgment, or of a writ of error; and it is cured by a verdict of guilty as to one of the offences, and not guilty as to the other."

But it is laid down by Mr. Chitty, (1 Ch. Cr. L. 253,) that, "in cases of felony, no more than one distinct offence or criminal transaction at one time should regularly be charged upon the prisoner in one indictment, because, if that should be shown to the court before plea, they will quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge to the jury." "And if they do not discover it until afterwards, they may compel the prosecutor to elect on which charge he will proceed. But this is only *matter of prudence and discretion*, which it rests with the judge to exercise. For, in point of law, there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment, against the same offender, and it is no ground either of demurrer or arrest of judgment;" and for this Mr. Chitty cites 3 T. R. 105; 2 Ea. P. C. 515; 2 Camp. 131; 3 Camp. 132; Cro. C. C. 41; Burn, J., "*Indictment*," iv.; 2 H. P. C. 173; 2 Leach, 1103. And Mr. Starkie says, (1 Stark. Cr. Pl. 39,) "If several felonies be charged against a prisoner in the same indictment, it is no objection either upon demurrer or in arrest of judgment, for on the face of an indictment every distinct count imports to go for a distinct offence."

In the case of *Young v. Rex*, 3 T. R. 105, Mr. Justice Buller says, "In misdemeanors, the case in *Burrow [Rex v. Benfield, 2 Burr. 980]* shows that it is no objection to an indictment, that it contains several charges. The case of felonies admits of a different consideration; but even in such cases it is no objection in this stage of the prosecution [i. e. on writ of error.] On the face of an indictment, every count imports to be for a different offence, and is charged as at different times; and it does not appear on the record whether the offences are or are not distinct. But if it appear, before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury;" "but these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. I did it at the last sessions at the Old Bailey, and hope that in exercising that discretion I did not infringe on any rule of law or justice. But if the case has gone to the length of a verdict, it is no objection in arrest of judgment. If it were, it would overturn every indictment which contains several counts." In the same case, Mr. Justice Grose says, "I am clearly of opinion that it is no objection in arrest of judgment, that the indictment charges several offences. The different counts in the indictment always state the offences as separate; and if this objection were to prevail, every indictment which contains two counts must be bad. *It is no objection even in the case of felonies*, still less is it so in misdemeanors."

**F. V. Lee*.—I apprehend, that in this case the prisoner may [*504 plead over.

Talfourd, Serjt., for the prosecution.—It is certainly not a settled point.

Greaves, amicus curiæ.—In the case of *Regina v. Purchase*, C. & Mar. 617, which was tried at Gloucester, and in which I was counsel, Mr. Justice PATTESON expressly held the party entitled to plead over, and that was a case of embezzlement.

TINDAL, C. J.—It is a very doubtful point. I give no *judg- [*505 ment. I only forewarn the counsel that they may be concluded by the demurrer.

F. V. Lee.—We had thought, after the cases of *Regina v. Phelps*, Car. & M. 190, and *Regina v. Adams*, Id. 299, that this point had been decided, but your lordship having expressed a doubt upon it, we will withdraw the demurrer.(a)

The demurrer was withdrawn, and the prisoner pleaded, Not guilty.

It was stated by the witnesses, that the prisoner was employed "in getting up the pedigree of Mr. John Wood," who claimed to be heir-at-law of the late Mr. James Wood of Gloucester, and that the prisoner called on three several occasions to search the register of the parish of Croome d'Abitot; and on the last occasion, whilst Mr. Hart, the curate, was looking into the iron chest for a register-book of Pirton parish, (which for some purposes is united to Croome d'Abitot,) the prisoner tore off the lower portion of one of the leaves of the parish register of Croome d'Abitot, the part of the leaf which was torn off being entirely separated from the residue.

*The page of the register-book which was torn was as fol- [*506 lows:—

Bur. George Surman, July 6th, 1741.

The Rev. Mr. Brian Harding, Rect. of this Parish, was buried Oct^r. y^e 10th, 1741.

Oct^r. 4th, 1741, John Rawlins & Izabel Thomason were marry'd pr. Licence.

Dec^r. 19th, 1741, Thomas, son of Richd. & Elizabeth Ran, was baptized.

Dec^r. 27th, George, son of John & Mary Lyes, was baptiz'd 1741.

Jan^y. 12th, 1741, Mary Fernal was bury'd.

Febr^y. 7th, 1741, John, son of Solomon & Ann Kirby, was baptiz'd.

Febr^y. 19th, The same John was bury'd.

By the tearing of the leaf, all that part of it which is below the dotted line had been completely detached from the book, that part which is above the dotted line being left in the book, and still forming part of it.

(a) In the case of *Gray v. The Queen*, (in error,) in the House of Lords, September 2d, 1844, Tindal, C. J., Pollock, C. B., Patteson, J., Williams, J., Coltman, J., and Wightman, J., were of opinion, that a prisoner indicted on the stat. 1 Vict. c. 85, for shooting with intent to murder, was entitled to challenge jurors peremptorily, although the offence of shooting with intent to murder is not capital, and notwithstanding the statement of most of the text-writers, that the right to challenge peremptorily is a privilege *in favorem vite*. But Baron Parke was of opinion that the peremptory challenge of the jurors ought to be disallowed in that case as being a privilege *in favorem vite* only; that the privilege ceased when the offence for which the person was tried was no longer capital. The House of Lords, however, acted upon the opinion of the majority of the judges, and decided that the prisoner was in that case entitled to challenge peremptorily, although he was not charged with a capital offence.

When the book was produced at the trial, the portion of the leaf which had been torn off had been pasted to the remaining portion in the book, and the whole was as legible as it was before the leaf had been torn.

To prove that the prisoner had torn the leaf of the register-book wilfully, evidence was given that he had been several times at the registry of the Bishop of Worcester, and from that registry the transcript of the Croome d'Abitot register for the year 1741 was produced; and it was imputed on the part of the prosecution, that that transcript had been altered so as to suit the pedigree of Mr. John Wood, and that the prisoner's object in destroying a part of this leaf of the Croome d'Abitot register was, that this transcript should become good secondary evidence in support of that

*507] pedigree.

*The transcript which was given in evidence was as follows:—

An account of all the Christenings, Weddings, and Burials that were in the Parish of Crompton d'Abbitot, in the county and diocese of Worcester, in the year one thousand seven hundred and forty-one, taken from the register-book belonging to the said parish

Baptized.

Decr. 13, Thomas, the son of Richard Ran and Elizabeth his wife.

27, George, the son of John Lyes and Mary his wife.

Febr. 7, John, the son of Solomon Kerby and Anne his wife.

Marryed.

Octr. 4, Ralph Watson, of the parish of Woodstock, in the county of Oxford, and Mary Wood, of Pitchcomb in the county of Gloucester.

Buried.

Octr. 10, The Rev. Mr. Brian Harding, Rect. of this Parish.

Janr. 12, Mary Fernal.

Febr., 19, John, the son of Solomon and Anne Kerby.

Examined by me, April 20, 1742,

Attested by us,

T. THOMAS, Curate.

WILLIAM THORNKLOX, }
THOMAS BUCKLE, } Churchwardens.

The defence was, that the prisoner had torn the leaf of the register by accident.

TINDAL, C. J., in summing up, left it to the jury to say, whether this was a mere accidental destruction of this part of the register, or whether it was done by the prisoner wilfully and with a sinister motive, in order to make that evidence, which, unless the original register were destroyed, never could be used at all.

Verdict—Guilty.

F. V. Lee, for the prisoner.—This indictment is founded on the 20th section of the stat. 1 Will. 4, c. 66, by which it is enacted, (*inter alia*), "That, if any person shall wilfully *destroy, deface, or injure*, or cause or permit to be destroyed, defaced, or injured, any such register or any part *508] thereof," * (that is, any register of baptisms, marriages, or burials of any parish, &c., or any part thereof,) every such offender shall be guilty of felony, and may be transported or imprisoned. Now, I submit, *first*, that this was neither a destroying nor defacing nor injuring of the register, or any part of it, within the meaning of this enactment, inasmuch as the register, as it is now produced, has the torn piece pasted to the residue of the leaf, and is quite as legible as before. *Secondly*, I submit, that the indictment is bad, because, in every count, it charges three distinct and separate offences, namely, the destroying, the defacing, and the injuring of this register, each of these being a separate felony. And, *thirdly*, I submit, that the indictment ought to have contained an allegation, that the offence was committed *scienter*.

TINDAL, C. J., reserved all the three points for the opinion of the fifteen judges, and sentenced the prisoner to be transported for seven years.

Talfourd, Serjt., *W. J. Alexander*, and *Keating*, for the prosecution.
F. V. Lee, *E. Yardley*, and *J. W. Smith*, for the prisoner.

Before Lord DENMAN, C. J., TINDAL, C. J., POLLOCK, C. B., PARKE, B., GURNEY, B., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., MAULE, J., ROLFE, B., WIGHTMAN, J., CRESSWELL, J., and ERLE, J.

J. W. Smith, for the prisoner.—I submit, that this indictment is bad in arrest of judgment, on account of multifariousness, or, rather, of uncertainty as to which of *the offences will be proved against the prisoner. The words of the stat. 1 Will. 4, c. 66, s. 20, are, if [*509 any person shall wilfully “destroy, deface, or injure” any register of any parish, &c.; the destroying, the defacing, and the injuring being each a separate felony; and it has always been held that want of singleness was an objection to an indictment, whether from its being too general, or for more offences than one being included in it. The first case decided on this ground of objection is that of *Rez v. Roberts*, Carth. 226; 4 Mod. 100, which was an information against a ferryman, that he took and extorted of divers liege subjects, to the attorney-general unknown, divers sums of money above the ancient rate. It was objected, that this was too general, and the information was held to be bad; and Lord HOLT said, “In every such information, a single offence ought to be laid and ascertained.”

POLLOCK, C. B.—That case would have resembled the present, if it had been charged here that the prisoner had injured divers registers of divers parishes.

Lord DENMAN, C. J.—There was no objection to the “cepit et extorsit.”

J. W. Smith.—In the case of *Rez v. Clendon*, 2 Ld. Raym. 1572, an indictment which charged an assault upon J. S. and J. N. was held bad in arrest of judgment. In the case of *Rez v. Bensfield*, 2 Burr. 980, the defendant was charged with having collected a crowd before the prosecutor’s door, by singing songs reflecting on the prosecutor and another person. It was there objected, that one indictment would not lie for publishing two distinct libels on two distinct persons; but that does not, of itself, make against me here, because *singing several libellous songs might lead [*510 to one breach of the peace. However, in that case, the authority of *Rez v. Clendon* was much questioned, as the court “treated it as a case that was not well considered, and held it not to be law,” and said, “Cannot the king call a man to account for a breach of the peace, because he broke two heads instead of one? How many informations have been for libels on the king and his ministers?” And, in that case, a precedent of an indictment for assaulting two on the highway is cited from West’s Symboleography.^(a) The next case is that of *Rez v. Fuller*, 2 Leach, 916, and 1 B. & P. 180. In that case, the indictment consisted of two counts, the first of which charged, that the prisoner feloniously endeavoured

(a) Tit. “Indictment,” s. 191. In the case of *Regina v. Giddins*, C. & Mar. 684, it was held, by Tindal, C. J., that an indictment for robbery which charges the prisoner with having assaulted G. P. and H. P., and stolen 2s. from G. P. and 1s. from H. P., is correct, if the robbing of G. P. and H. P. was all one act, and that, if it were so, the counsel for the prosecution ought not to be put to elect.

to seduce a soldier from his allegiance; and the second, that he feloniously endeavoured to incite a soldier "to commit an act of mutiny, and to commit traitorous and mutinous practices." It was objected at the trial, and afterwards, before the twelve judges, by the present Baron GURNET, that the second count contained charges of two distinct felonies; but to that objection it was answered, by Mr. Abbott, afterwards Lord TENNERDEN, for the crown, that, "If the endeavour was but one act, and it must be so taken now, the indictment is right, for it cannot charge the offence more accurately than it took place. If the act was general, it cannot be made particular by the indictment." There were other objections to the first count of the indictment, which were all overruled; and in giving judgment on this part of the case, Baron PERRYNS said, "The third objection is, that the second count of this indictment comprehends two
 *511] distinct offences. Probably, it will be found to be a sufficient answer to this, that, though the charge might have been branched into separate offences, the whole may be but parts of one fact of endeavour, which must be stated as it is. But, in the circumstances in which this prisoner now stands convicted upon the first count of this indictment, to which no sufficient objection has been taken, and upon which, therefore, judgment must be pronounced against him, it is not absolutely necessary that the judges should decide upon this last objection, and, therefore, I forbear to enter further into the consideration of it." There being, in the case of *Rex v. Fuller*, no judgment against the prisoner on the second count, I submit that it is not an authority against me; and when it is considered by whom that case was argued, and that it was not rested on the ground that duplicity was not an objection, even if the count did charge two felonies, it rather leads to an inference that the point I am now taking was considered tenable. In the case of *Rex v. Marshall*, M. & C. 158, the indictment charged the prisoner with breaking into a dwelling, and stealing therein above the value of 5s.; but it did not state whether any person was in the house at the time of the offence, or not. As the law then stood, by the stat. 39 Eliz. c. 15, stealing in a dwelling-house to the value of 5s., no person being therein, was a capital offence; and by the stat. 3 Will. & M. c. 9, s. 1, the stealing in a dwelling-house in the daytime, any person being therein, was also a capital offence. But in that case, although it was considered by the judges "that clergy was taken away equally whether any person was in the dwelling-house or not, the property stolen being above the value of 5s., yet they were unanimously of opinion that the indictment ought to have shown upon which charge the case was founded; otherwise the prisoner would not have the means
 *512] of knowing, as he ought, which charge he was to meet, and that the prisoner was, therefore, entitled to his clergy."

TINDAL, C. J.—The objection there was, that the indictment did not state enough. You complain that this indictment states too much. Your objection would equally apply to an indictment for burglary, which stated that the prisoner in the night-time broke and entered a house with intent to steal, and that he did steal.

PARKE, B.—The indictments for forging bank-notes used to state in one count that the prisoner "feloniously did falsely make, forge, and counterfeit, and cause and procure to be falsely made, forged, and counterfeited, and willingly act and assist in the false making, forging, and counterfeiting a certain promissory note," &c.; and in another count, that the prisoner "did offer, dispose of, and put away" the note.

J. W. Smith.—The count for forging is all tautology. A person who aids in a forgery is a forger himself.

PARKE, B.—That cannot be said of the count for offering, disposing of, and putting away. The two latter may be the same; but offering and disposing of are different.

TINDAL, C. J.—Indictments on the stat. 9 Geo. 4, c. 31, s. 11, were always, “did stab, cut, and wound.”

WILLIAMS, J.—In a case before Baron Wood, the indictment charged, that the prisoner did set on fire, burn, and destroy a hovel. The hovel was burnt to a very small extent, and it was objected, that the indictment was not proved as to the destroying; but it was held, that enough was proved to sustain the charge.

**J. W. Smith.*—In the case of *Rez v. Stocker*, 5 Mod. 137, [513 1 Salk. 342, 371, it was held, that an indictment for forging a bill of lading, which charged that the prisoner “scienter et subtiliter, nequiter et falso, fecit et fabricavit, *vel* fieri et fabricari causavit, quendam chartam, videlicet, quendam billam exonerationis, cujus tenor sequitur,” &c., was bad.

PARKE, B.—Your observations would apply to the common count for burglary, which involves a breaking in the night-time, with intent to steal—a breaking and stealing—stealing in the dwelling-house to the value of £5, and while the offence of petty larceny remained, whether there was a stealing to the value of twelve-pence, or more. (a)

POLLOCK, C. B.—And the prisoner would be quite certain that the judge would only allow him to be tried for one transaction.

TINDAL, C. J.—It is all laid at one time and one place.

J. W. Smith.—I can conceive a case in which the prisoner might have been embarrassed in his defence. The prisoner might know that he had defaced the register, but that he had not been guilty of the destruction of it, and he might be able to plead *autrefois acquit* as to the defacing.

TINDAL, C. J.—He might plead *autrefois acquit* as to the defacing, and not guilty as to the residue.

J. W. Smith.—If a single act is charged at one time and *place, [514 I am not sure that a prisoner could plead to one epithet only.

TINDAL, C. J.—Is not that an answer to your objection, that this is substantially a charge of one offence committed at one time and one place?

J. W. Smith.—It is not certain to which part of the charge the prisoner is to direct his defence, which brings me to another point, which is, that there was no destroying here, and the prosecutor is, therefore, driven from the argument, that it is all one thing; because here one, or, at most, two of the felonies charged in each count of the indictment are proved, those being the injuring and defacing,—and the third, the destroying, is not proved; and it is a hardship on the prisoner, that it should be urged against him, that there is a probability that all the three felonies are identical, and yet that he should be told that the indictment is supported by proof of one, or, at most, two of them only. Another point is, that it is not averred in this indictment, that the prisoner committed the offence “knowingly;” and it is submitted, that the offence might be wilful, and yet it might be done the prisoner not *knowing* that the book fell within

(a) In the case of *Rez v. Compton*, 3 C. & P. 418, it was held, that, on an indictment for burglary by breaking into a house in the night-time, and stealing to the value of £5, or more, the prisoner might be convicted of burglary or of house-breaking, under the stat. 7 & 8 Geo. 4, c. 29, s. 12, or of stealing in a dwelling-house to the value of £5.

the description in the statute. In the Staffordshire riots in 1842, a clergyman's books were burnt, but I doubt whether the rioters could have been convicted on this enactment, if they did not know that any register books were there, although what they did was wilful.

GURNEY, B.—The statute uses the word “wilfully,” and that is in the indictment.

PARKE, B.—It is sufficient, in this stage of the proceedings, that the indictment follows the words of the act.

*515] J. W. Smith.—If some other words are necessary to *constitute the offence, I would suggest, that those words must be introduced, or the indictment will be bad.^(a)

PARKE, B.—It is quite settled, that, if the objection is taken on the trial, that is the same as in arrest of judgment; and if you have pleaded to the indictment, you are in the same situation as to objections as you are after verdict.

GURNEY, B.—This point would go to every offence; theft, for instance.

PARKE, B.—Or murder.

POLLOCK, C. B.—The word “knowingly” occurs in the earlier part of the 20th section of the stat. 1 Will. 4, c. 66, as to some other offences, but not in the latter part, which relates to destroying, defacing, or injuring registers.

TINDAL, C. J.—If this point was open to you on demurrer, you should have the benefit of it now, as Mr. Lee wished to demur, but would not do so, unless I would say that the prisoner should answer over, if the demurrer *516] was *decided against him; which I would not do, as I thought it a very doubtful point.

GURNEY, B.—This objection would be no more on demurrer than it is now.

TINDAL, C. J.—I reserved the case because it was the first case on this enactment; but, I confess, I thought nothing of either of the objections at the time of the trial.

Lord DENMAN, C. J.—We are of opinion, that all that has been done is perfectly right with respect to all the points.

Keating, for the prosecution, was not heard.

THE JUDGES were unanimously of opinion, that the conviction was right.

(a) In the case of *Martin v. Regiam*, (in error,) 3 N. & P. 472, it was held, that an indictment for obtaining goods by false pretences must state to whom the goods belonged; and if it do not, this will not be good after verdict, under the stat. 7 Geo. 4, c. 64, s. 21. And Mr. Justice Littledale said; “However the 7 Geo. 4 may cure an indictment of this kind, so far as the description of the offence itself is concerned, I am of opinion that the goods which are the subject-matter of the offence must be described with convenient certainty, as at common law.” And Mr. Justice Patteson said, “It is true that the section of the act describing this offence says, if ‘any person’ shall, by ‘any false pretence,’ obtain ‘any chattel,’ &c.; yet the ‘any’ person must be named, the ‘false pretences’ particularized, and so must the chattel,” by stating what it was, and to whom it belonged: it is not enough to say, generally, that a chattel was obtained with intent to defraud a person, although his name is mentioned.” See the case of *Rez v. Norton*, 6 C. & P. 196.

STAFFORD ASSIZES.

(Civil Side.)

BEFORE LORD CHIEF JUSTICE TINDAL.

ARKLE and Others, Assignees of MORRIS, a Bankrupt, v. WAKEMAN.

In an action for use and occupation by the assignees of a bankrupt, it was proved that the defendant had said that he had been served with a writ for rent by the attorney for the assignees, but that the bankrupt was his landlord, and his attorney had sent an indemnification for the bankrupt to sign, which the bankrupt had signed:—*Held*, that the assignees were entitled to give in evidence statements made by the bankrupt, without any further proof of the nature or extent of the indemnity.

DEBT for the use and occupation of a house and premises of the bankrupt before his bankruptcy. Second count, for use and occupation of the house and premises since the bankruptcy. Plea, *nunquam indebitatus*.

*It was proved that the defendant had said that he had been served with a copy of a writ by Mr. Collis, the attorney for the [*517 plaintiffs, for rent, and he had taken it to Mr. Shaw, his attorney; and that Morris, the bankrupt, and his wife were his landlords, and that he could not pay two rents; and that Mr. Shaw had sent an indemnification for Morris and his wife to sign, and that they had signed it.

Talfourd, Serjt., for the plaintiffs, proposed to give in evidence statements made by Morris, the bankrupt.

W. J. Alexander.—I submit, that what Morris, the bankrupt, said is not evidence against the defendant.

TINDAL, C. J.—He has indemnified the defendant.

W. J. Alexander.—Does your lordship think that there is sufficient proof of the indemnity, as there is no evidence at all to show what is the nature or extent of any indemnity that may have been signed by Mr. and Mrs. Morris?

TINDAL, C. J.—If a defendant says, “I am indemnified,” that is sufficient to let in the evidence of statements made by the person by whom he says he is indemnified.

The evidence was received.

Verdict for the plaintiffs.

Talfourd, Serjt., *Whitmore*, and *Allen*, for the plaintiffs.

W. J. Alexander and *Carrington*, for the defendant.

*SHROPSHIRE ASSIZES.

[*518

(Crown Side.)

BEFORE LORD CHIEF JUSTICE TINDAL.

REGINA v. JOSEPH HAYWARD.

A. had agreed to buy straw of B., and sent his servant C. to fetch it. C. did so, and put down the whole quantity of straw at the door of A.'s stable, which was in a court-yard of A., and then went to A., and asked him to send some one with the key of the hay

loft, which was over the stable, which A. did, and C. put part of the straw into the hay-loft, and carried the rest away to a public-house, and sold it:—*Held*, that this carrying away of the straw by C., if done with a felonious intent, was a larceny, and not an embezzlement, as the delivery of the straw to A. was complete when it was put down at the stable-door.

EMBEZZLEMENT.—The first count of the indictment charged, that, on the 24th of July, 1844, the prisoner, being the servant of Allen Boyd, embezzled forty pounds' weight of straw, his property. The second count was for a larceny in stealing the straw, laying the property in Allen Boyd, the prisoner's master; and the third count was also for larceny, laying the property in John Morris and another.

It was proved, that, previously to the 24th of July, 1844, Allen Boyd, the prosecutor, had ordered some straw of Messrs. Morris, and was to send for it; and that, on the 24th of July, he sent the prisoner (whom he then employed at 20*d.* a day) to Messrs. Morris's to fetch it. The straw was then delivered by Mr. John Morris to the prisoner, who took it into the prosecutor's court-yard, and put it down at the stable-door; and the prisoner then went to the prosecutor to ask him to send some one to open the hay-loft, which was over the stable, that the straw might be put in. The prosecutor sent his niece, who opened the hay-loft, and saw the prisoner put a part of the straw into the hay-loft, and take the rest away in a direction towards the Plough public-house at Whitchurch, where it was proved that the prisoner sold it.

TINDAL, C. J., (in summing up.)—If the prisoner took away this straw to the public-house with a felonious intent, it was a stealing of it from his master, Allen Boyd, as his putting the whole quantity of straw at the stable-door, on his master's premises, was a delivery of it to his master; and his taking a part of it away afterwards, if it was done with a felonious intent, would be a larceny of the property of his master, and not an embezzlement. The only question, therefore, is, whether you think there was a felonious intent. Verdict—Not guilty.

Carrington, for the prosecution.

REGINA v. MARY HUGHES.

A person may be indicted for perjury who gives false evidence before a grand jury when examined as a witness before them upon a bill of indictment, and another witness on the same indictment, who is in the grand jury-room while such person is under examination, is competent to prove what such witness swore before the grand jury, and so is a police-officer who was stationed within the grand jury-room door to receive the different bills at the door, and take them to the foreman of the grand jury; these persons not being sworn to secrecy, although the grand jury are so.

To convict a person of perjury in swearing falsely before a grand jury, it is not sufficient to show that the person swore to the contrary before the examining magistrate, as *non constat*, which of the contradictory statements was the true one.

PERJURY.(a)—The first count of the indictment stated, that at the general quarter sessions of the peace, holden in and for the county of Salop, on the first of January, 1844, before the Hon. Thomas Kenyon, &c., [setting out the caption of the sessions,] a certain bill of indictment against Thomas Hughes, and Fanny the wife of Richard Porter, was, in due form of law,

(a) This indictment had been found at the last assizes, and the defendant, having been taken on a judge's warrant founded on this indictment, had been discharged on two sureties entering into a recognisance before a magistrate, conditioned that the defendant should appear at these assizes, and there plead to, and take her trial on this indictment.

exhibited to William Smith, William Brisbane, &c., [naming the grand jurors,] "good and lawful men of the said county, then and there sworn and charged to inquire, for our said lady the queen, and the body of the said county," which indictment was as followeth, [setting out the indictment *verbatim*, which charged, that Thomas Hughes feloniously stole three tablecloths, the property of Richard Hughes, and that Fanny Porter received them, knowing them to be stolen.] That, before the said good and lawful men had the said bill of indictment exhibited to them and before they inquired touching the matters stated therein, the defendant was sworn by the justices at the quarter sessions to give evidence on the said indictment before the said good and lawful men, so sworn, &c. That the grand jury did inquire touching the matters contained in that indictment, and that, on that inquiry, it was a material question, whether the tablecloths were the property of Richard Hughes, or of Thomas Hughes [This count contained other averments of materiality.] That the defendant, being so sworn, went before the said good and lawful men, so sworn, &c., and, upon the inquiry before them touching the truth of the matters stated in that indictment, falsely, &c., on the said inquiry did swear (*inter alia*) that "the three tablecloths then and there produced were her son's, (meaning the said Thomas Hughes's,) and that the said tablecloths had belonged to the mother of the said Mary Hughes, and were to be divided among her, the said Mary Hughes's, children, of whom the said Thomas Hughes was one;" whereas, in truth and in fact, the tablecloths were not then, and never were, the property of Thomas Hughes, as the defendant well knew; and whereas, in truth, and in fact, they were the property of Richard Hughes, as the defendant well knew; and whereas, in truth and in fact, the mother of Mary Hughes was a married woman at the time of her death, and Mary Hughes's children were not born at that time. (a)

The defendant did not take out any traverse-book, or enter any traverse for trial, but, at the end of the cases of felony, surrendered herself in court into the custody of the governor of the prison, and was tried under the commission of jail delivery. See the case of *Regina v. Hibbard*, ante, p. 461.

(a) The first count of the indictment was in the following form:—"Shropshire, to wit. The jurors for our lady the queen, upon their oath, present, that heretofore, to wit, at the general quarter sessions of the peace of our sovereign lady the queen, held at the shirehall in Shrewsbury, in and for the county of Salop, on Monday in the first week after the 28th day of December, to wit, the 1st day of January, in the 7th year of the reign of our sovereign lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, queen, defender of the faith, and in the year of our Lord 1844, before the Honourable Thomas Kenyon, Sir Baldwin Leighton, Baronet, John Arthur Lloyd, Esq., and others their associates, her majesty's justices, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county done and committed, a certain bill of indictment against Thomas Hughes, late of the parish of Whitechurch, in the county of Salop, labourer, and Fanny Porter, wife of Richard Porter, labourer, late of the parish of Whitechurch, in the county aforesaid, was then and there, in due form of law, exhibited to [naming the grand jurors,] good and lawful men of the said county of Salop, then and there sworn and charged to inquire, for our said lady the queen, and the body of the said county; which said bill of indictment then and there was as followeth, that is to say, [setting out the indictment *verbatim*, which was against Thomas Hughes, for stealing three tablecloths, the property of Richard Hughes, and against Fanny Porter, for receiving them, knowing them to have been stolen.]

"And the jurors first aforesaid, upon their oath aforesaid, do further present, that, to wit, on the day and year first aforesaid, to wit, at the parish of St. Chad, in the borough of Shrewsbury, in the county of Salop, and before the said good and lawful men, who were so sworn and charged to inquire as aforesaid, had the said bill of indictment exhibited to them as aforesaid, and before the said good and lawful men had inquired, as by law they ought to do, touching the matters stated and mentioned in the said bill of indictment, and touching the truth of the matters stated and contained in the said bill of in-

*521] *The *second* count was similar to the first, except that it stated,
 *522] that the grand jurors, (naming them,) "good and *lawful men of
 the county of Salop, were then and there, in due form of law, sworn

dictment, Mary, the wife of Richard Hughes, late of the parish of Whitchurch, in the county of Salop, labourer, appeared before the court of general quarter sessions of the peace, holden as aforesaid, before the said justices, and the said others, their associates, as aforesaid, as a witness in support of the said bill of indictment, and was then and there, at the said general quarter sessions of the peace, holden as last aforesaid, before the said justices, and the said others, their associates, duly sworn, and took her corporal oath, upon the holy Gospel of God, before the said Honourable Thomas Kenyon, Sir Baldwin Leighton, Baronet, John Arthur Lloyd, Esq., and the said others, their associates, so being such justices as aforesaid at the said general quarter sessions of the peace, holden as aforesaid, that the evidence that she the said Mary Hughes should give before the grand jury (meaning before the said good and lawful men so sworn and charged as aforesaid to inquire as aforesaid) on the said bill of indictment should be the truth, the whole truth, and nothing but the truth, (they the said Honourable Thomas Kenyon, Sir Baldwin Leighton, Baronet, John Arthur Lloyd, Esq., and the said others, their associates, so being such justices as aforesaid at the said general quarter sessions of the peace, holden as aforesaid, then and there having sufficient and competent authority to administer the said oath to the said Mary Hughes in that behalf.)

"And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the day and year first aforesaid, at the parish of St. Chad, in the borough of Shrewsbury, in the said county of Salop, the said good and lawful men, being so sworn and charged as aforesaid to inquire as aforesaid, did, in due form of law, and according as they were so sworn and charged as aforesaid, inquire touching the matters, and touching the truth of the matters stated and contained in the said bill of indictment so exhibited to them as aforesaid.

"And the jurors first aforesaid, upon their oath aforesaid, do further present, that, upon the said inquiry, by and before the said good and lawful men, so as aforesaid sworn and charged to inquire as aforesaid, it then and there became and was a material question, whether three tablecloths, which were then and there produced before the said good and lawful men, were the property of Richard Hughes, the husband of the said Mary Hughes; and that, upon the said inquiry, it then and there also became and was a material question, whether the said three tablecloths were the property of the said Thomas Hughes; and that, upon the said inquiry, it then and there became and was a material question, whether the said three tablecloths had at any time belonged to the mother of the said Mary Hughes; and that, upon the said inquiry, it then and there became and was a material question, whether the said three tablecloths had at any time been the property of the said Thomas Hughes; and that, upon the said inquiry, it then and there became and was a material question, whether the said three tablecloths had at any time been the property of the said Richard Hughes.

"And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the day and year first aforesaid, at the parish of St. Chad, in the borough of Shrewsbury aforesaid, in the county of Salop, the said Mary Hughes, being so sworn as aforesaid, contriving and intending to pervert the due course of justice, went before the said good and lawful men, so sworn and charged as aforesaid to inquire as aforesaid, and before the said good and lawful men, upon the said inquiry by and before the said good and lawful men, touching the matters, and touching the truth of the matters stated and contained in the said bill of indictment, and that she the said Mary Hughes, then and there, upon her oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said good and lawful men, so sworn and charged as aforesaid to inquire as aforesaid, upon the said inquiry did depose and swear, amongst other things, in substance and to the effect following, that is to say, that the three tablecloths which were then and there, to wit, at the time and place last aforesaid, produced, then were her son's, (meaning were the property of the said Thomas Hughes,) and that the said tablecloths had belonged to the mother of the said Mary Hughes, and were to be divided amongst her the said Mary Hughes's children, of whom the said Thomas Hughes was one; whereas, in truth and in fact, the said tablecloths then were not her the said Mary Hughes's son's, as she the said Mary Hughes then and there well knew; and whereas, in truth and in fact, the said tablecloths were not then the property of the said Thomas Hughes, as she the said Mary Hughes then and there well knew; and whereas, in truth and in fact, neither of the said tablecloths ever had been the property of the said Thomas Hughes; and whereas, in truth and in fact, the said tablecloths then were the property of the said Richard Hughes, as she the said Mary Hughes then and there well knew; and whereas, in truth and in fact, the said tablecloths, and each

and charged to inquire, for our *said lady the queen, and the body [*523 of the said county, and then and there were the grand jurors who constituted and *who were the grand jury of, for, and at the said [*524 last-mentioned general quarter sessions of the peace;" and mentioned the grand jury throughout as "the said last-mentioned grand jury." The *third* count stated, that Thomas Hughes was charged with having stolen three tablecloths, the property of Richard Hughes, and was brought before Sir R. C. Hill, Knt., R. D. Vaughton, and W. H. Poole, Esqrs., on that charge, and that the tablecloths were produced before them, and that the defendant then swore that the tablecloths were her husband Richard Hughes's property, and that, at the Shropshire quarter sessions, holden on the 1st of January, 1844, a bill of indictment was duly prepared, and the name of the defendant endorsed thereon as a witness, and that the defendant was sworn to give evidence, and gave evidence before the grand jury that the tablecloths had belonged to her mother, and were to be divided among her children, "and that the tablecloths (meaning the said last-mentioned three tablecloths) she considered were left for her son, (meaning the said Thomas Hughes;) and that the said Mary Hughes, upon being told by William Smith, the foreman of the said last-mentioned grand jury, that considering would not do, she the said Mary Hughes falsely, wilfully, and corruptly did then and there falsely, wickedly, wilfully, and corruptly then and there positively say, depose, and give evidence to the said last-mentioned grand jury, that they (meaning the said last-mentioned tablecloths) were her son's, (meaning thereby, that the said last-mentioned tablecloths were the property of the said Thomas Hughes.)" This count then went on to assign perjury on this evidence; and it also contained averments of materiality similar to those in the first count.

*It was opened by *Carrington* for the prosecution.—That the perjury charged against the defendant was alleged to have been [*525 committed by her, before the grand jury at the Shropshire quarter sessions, held on the 1st of January, 1844, in giving evidence, on a bill of indictment against her son, Thomas Hughes, for stealing three tablecloths, and against Fanny Porter for receiving them, knowing them to have been stolen. He was not aware of any instance of an indictment for perjury committed before a grand jury; but there seemed to be no reason why such an in-

of them, were, at the time last aforesaid, and for twenty years and more before that time, the property of the said Richard Hughes, as she the said Mary Hughes then and there well knew; and whereas, in truth and in fact, the said tablecloths never did belong to the mother of the said Mary Hughes, as she the said Mary Hughes then and there well knew; and whereas, in truth and in fact, the said tablecloths were not to be divided amongst the children of the said Mary Hughes; and whereas, in truth and in fact, the mother of the said Mary Hughes was a married woman at the time of the death of her the said mother, and had been so for twenty years and more before the time of her said death; and the said Thomas Hughes and the other children of the said Mary Hughes were not born at the time of the decease of the said Mary Hughes's mother, as she the said Mary Hughes then and there well knew. And so the jurors first aforesaid, upon their oath aforesaid, do say, that on the said 1st day of January, in the year first aforesaid, at the parish of St. Chad aforesaid, in the county of Salop, before the said good and lawful men, so sworn and charged as aforesaid to inquire as aforesaid, upon their inquiry aforesaid touching the matters, and touching the truth of the matters stated and contained in the said bill of indictment, by her own act and consent, and of her own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury, in contempt of our lady the queen and her laws, to the evil example of all others in the like case, offending against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity."

dictment should not be preferred. The proceedings before the grand jury were preliminary to a trial, and so were the proceedings before the examining magistrate, on a charge of felony; but indictments for perjury committed on those examinations were not uncommon. In many cases it would be difficult to prove what a witness swore before a grand jury, as the grand jurors were all sworn to secrecy, and it frequently happened that nobody was present except the grand jurors and the witness; there seemed, however, to be no impropriety in some one or more proper persons being present with the grand jury during their inquiries on bills of indictment, as in the Court of Queen's Bench the grand jurors, who were sworn every term, had with them, in their room, a principal officer of the Court of Queen's Bench, who was styled the clerk of the grand juries; so at the Central Criminal Court, of which court all the judges of England were members, Mr. Marshall Straight, one of the principal officers of that court, sat with the grand jury, and, as each witness was examined, checked the examination with the deposition of the witness taken before the examining magistrate, with a view of preventing what was alleged to have occurred in this very case, namely, the witness swearing one thing before the magistrate, and the contrary before the grand jury. The practice, therefore, of other persons being present beside the grand jury and the witness, did not seem to be objectionable.

*526] *TINDAL, C. J.—I am not objecting to it.

Carrington.—The oath which prevented grand jurors from giving evidence of what occurred, did not, as he submitted, render inadmissible the evidence of any other person who was present. In one case (a) in which the jury had tossed up as to which way their verdict should be, it was held, that affidavits of the jurors, that they had done so, were not receivable; but that the affidavit of a person who was on the outside of the room, and had seen them, was admissible. In the present case, it would be proved, that, on the 29th of December, 1843, Thomas Hughes, the son of the defendant, was taken before Sir R. C. Hill and Captains Vaughton and Poole, on a charge of stealing three tablecloths, the defendant then swearing, that the tablecloths were the property of her husband Richard Hughes. Thomas Hughes was committed for trial at the ensuing quarter sessions, and when before the grand jury there, in giving evidence on the bill of indictment against Thomas Hughes for stealing the tablecloths, and Fanny Porter for receiving them, knowing them to have been stolen, the defendant swore, that the tablecloths which were then produced by a police-constable named Smith were her son's; that her mother had left them among her (the defendant's) children, of whom Thomas Hughes was one. This statement of the defendant would be proved by the police-constable Smith, who was in the grand jury-room at the time; and, also, by a superintendent of police, named Lewis, who was stationed within the door of the grand jury-room to receive the bills at the door and hand them to the foreman of the grand jury. To prove that this latter statement of the defendant was false, her deposition before the examining magistrates would be put in when she swore that the tablecloths were her husband's; but that alone might not be *sufficient, as it had been held in one case in the

*527] Court of King's Bench, (b) that an indictment against a witness for swearing contradictorily on two different occasions could not be supported.

(a) The case of *Vaise v. Delaval*, 1 T. R. 11. But see also the cases of *Owen v. Warburton*, 1 N. R. 326, and *Hindle v. Birch*, 8 Taunt. 26.

(b) *Raz v. Harris*, 5 B. & A. 926; and see also the case of *Reg. v. Wheatland*, 8 C. & P. 338.

TINDAL, C. J.—You must go further than that. If you merely prove the two contradictory statements on oath and leave it there—non constat, which statement is the true one.

Carrington.—I propose to falsify the defendant's statement made before the grand jury, by showing the state of the defendant's family, by proving that she herself was born in the year 1791; that her mother died in the year 1800, and her father in 1803; that she married in the year 1819, and that her son Thomas was born within a year or two after her marriage; so that, if her statement before the grand jury were true, the mother gave these tablecloths to the unborn children of her daughter, a child who, at the time of her death, was nine years old, the children of the daughter not being born for twenty years after, and the supposed giver being a married woman at the time of her death, and therefore incapable of making any gift at all.

An examined copy of the record of the ignored bill of indictment against Thomas Hughes for stealing the tablecloths, and Fanny Porter for receiving them, knowing them to have been stolen, was given in evidence. It was also proved, that the defendant was sworn at the Shropshire January quarter sessions, 1844, to give evidence on that indictment before the grand jury; the original indictment being produced by Mr. Peele, the deputy clerk of the peace.

*To prove what the defendant swore before the grand jury, a [*528 police constable named Smith was called.

E. Yardley, for the defendant.—I submit that this witness cannot be examined as to what the defendant swore before the grand jury. One of the grand jury would not be allowed to give the evidence; and, if this witness is examined, it is doing that indirectly which cannot be done directly, which ought not to be allowed.

TINDAL, C. J.—I am not so sure of that; he is not a grand juror.

E. Yardley.—It is effecting that by indirect means which could not be done directly.

TINDAL, C. J.—It is for the purposes of public justice. I shall receive the evidence.

The witness was examined. He stated that, before the grand jury, he produced the same tablecloths which were produced before the examining magistrates; and that, when the defendant was before the grand jury, he heard Mr. Smith, the foreman of the grand jury, ask her whether the tablecloths had belonged to any of her family; and that she said they had belonged to her mother, and were to be divided among her children, and that she considered that the tablecloths were left for her son; and that, on Mr. Smith the foreman telling her that considering would not do, the defendant said, "They are my son's."

A part of this evidence of the defendant before the grand jury was also deposed to by a superintendent of police named Lewis, who was stationed inside the grand jury-room door; but he stated that he did not hear the whole of what the defendant said, as he was out of the room a part of the time during which she gave her evidence before the grand jury.

*To prove the defendant's statement to be false, her deposition [*529 taken before the examining magistrates, Sir R. C. Hill and Captains Vaughton and Poole, on the 29th of December, 1843, was put in. In this she stated that the tablecloths were her husband's property, and that they had been her late mother's.

It was also proved by Mr. Lakin, the attorney for the prosecution, that he knew the father and mother of the defendant before their marriage, and had known their family since. He produced examined copies of the registers of the baptism of the defendant in 1791; of the burial of the mother in 1800; of the burial of her father in 1803; and of her marriage in 1819: and he stated that her son Thomas Hughes was now about twenty-three or twenty-four years of age.

TINDAL, C. J.—Have you any evidence to show that these tablecloths never did belong to the defendant's mother.

Carrington.—We have no further evidence on that; but it is proved that, at the time of her death, she was a married woman, and the defendant only nine years old.

TINDAL, C. J.—As the mother was a married woman at the time of her death, she could not legally leave these tablecloths to any one; but I observe that, both in her deposition before the magistrates, and in her evidence before the grand jury, the defendant stated that these tablecloths were her mother's, and, if the mother had ever said that these were to be divided among her daughter's children, the defendant might have been under the impression that they were so given, and that would be a reason for acquitting her on this charge, as, in order to warrant a verdict of guilty in a case of this kind, the jury must be satisfied that the statement was not only false, but wilfully false; and that to the knowledge of the party making the oath. *I think that in this case there is such doubt as to whether the defendant might not have been under the impression that the tablecloths were given among her children, as to warrant an acquittal. Verdict—Not guilty.

Carrington, for the prosecution.

E. Yardley, for the defendant.

MONMOUTH ASSIZES.

(Crown Side.)

BEFORE LORD CHIEF JUSTICE TINDAL.

REGINA v. JEREMIAH JAMES.

A rifle which is loaded, but which for want of proper priming will not go off, is not a "loaded arm" within the stat. 1 Vict. c. 85, s. 3; and the pointing a rifle thus circumstanced at a person, and pulling the trigger of it, whereby the cock and hammer were thrown, and the pan opened, will not warrant a conviction either of felony under the 3d section, or of assault under the 11th section, of the stat. 1 Vict. c. 85. It is an assault to point a loaded pistol at any one; but not an assault to point a pistol at another which is proved not to be so loaded as to be able to be discharged.

ATTEMPTING to discharge loaded arms.—The first count of the indictment charged, that the prisoner, on the 2d of November, 7 Vict., at Christchurch, "did, by drawing the trigger of a certain gun, then and there loaded with gunpowder and one leaden bullet, which said gun, so loaded and charged as aforesaid, the said J. J., in his right hand then and there had and held, feloniously, unlawfully, and maliciously did attempt to discharge the said gun so loaded and charged as aforesaid at and against one George Godwin, in the peace of God and our said lady the queen then

and there being, with intent then and there and thereby feloniously, wilfully, and of his malice aforethought, the said George Godwin to kill and murder, "against the form of the statute," &c. There were four other counts in the indictment, laying intents to maim, to disfigure, to disable, and to do grievous bodily harm. [*531]

It was proved by the prosecutor George Godwin, that, on the 2d of November, 1843, he went to demand possession of a house at Christchurch, and found William Rose attempting to distrain for rent there, and that he (the prosecutor) then had some words with the prisoner, who was also there, when the latter pointed a rifle at him, and he both heard and saw the cock of the rifle fall on the steel and open the pan; but he stated that there was no spark and no flash. The rifle was then wrested from the prisoner, and there was a small quantity of gunpowder, apparently quite damp, sticking to the pan. It was further proved that the prosecutor attempted to fire the rifle, having ascertained that there was a charge in it, but it would not go off; but, on its being primed with dry powder, it did go off.

Beadon, for the prisoner, cited the case of *Regina v. Baker*, ante, p. 254.

TINDAL, C. J.—I am of opinion that this was not a loaded arm within the statute,^(a) and that the prisoner can neither be convicted of the felony, nor of the assault. It is only an assault to point a loaded pistol at any one, and this rifle is proved not to be so loaded as to be able to be discharged.

Verdict—Not guilty.

Greaves, for the prosecution.

Beadon, for the prisoner.

(a) The stat. 1 Vict. c. 85, s. 3.

*REGINA v. DAVID RICHARDS.

[*532]

A. was supplied with a quantity of pig-iron by B. & Co., his employers, which he was to put into a furnace to be melted, and he was paid according to the weight of the metal which ran out of the furnace and became puddle bars. A. put the pig-iron into the furnace, and also put in with it an iron axle of B. & Co., which was not pig-iron; the value of the axle to B. & Co. was 7s., but the gain to the prisoner by melting it and thus increasing the quantity of metal which ran from the furnace was 1d.:—*Held*, that if the prisoner put the axle into the furnace with a felonious intent to convert it to a purpose for his own profit, it was a larceny.

LARCENY.—The prisoner was indicted for stealing iron, the property of William Williams and others, his masters.

The iron alleged to have been stolen was an iron axle of a tram wagon, and it was proved that the prisoner was employed as a puddler by the prosecutors, who were partners in an iron company; and that the puddlers employed by the company were in the habit of receiving a certain quantity of pig-iron which they were to put into the furnaces, and they were paid for their work according to the weight of the iron drawn out of the furnace and formed into puddle bars. The prisoner was detected by the foreman of the works in putting an iron axle, belonging to the company, (which was not pig-iron,) into the furnace with the pig-iron. The foreman stated, that the value of the axle to the company was about 7s., and he had calculated that the gain to the prisoner by putting it in the furnace and melting it would be, according to the mode adopted for paying for the work, a fraction more than a penny.

TINDAL, C. J.—I doubt whether the act of the prisoner, though unquestionably fraudulent and wrongful, comes within the definition of a larceny, as the iron was to come back to the owners in the same substance, though in another form.

G. K. Rickards, for the prosecution.—In the case of *Rex v. Morfit*, R. & R. C. C. 307, (a) it was held, that a servant's clandestinely taking his master's corn to give to his master's horse is felony; and in the case of *Rex v. Cabbage*, R. & R. C. C. 292, where the prisoner forced open a *533] stable door, and took out a horse *and led it to an old coal-pit, and there backed it down and killed it, the object being that the horse might not contribute to furnish evidence against another person, named Howarth, who was under the charge of stealing it. The judges held, that this was larceny, although the prisoner had no intention of deriving any pecuniary benefit from taking the horse.

TINDAL, C. J.—I shall leave it to the jury to say whether the prisoner put the axle into the furnace with a felonious intent, to convert it to a purpose for his own profit; for, if he did so, this was a larceny.

His lordship left this question to the jury.

Verdict—Guilty.

G. K. Rickards, for the prosecution.

(a) See also the cases of *Regina v. Handley, C. & Mar.* 547, and *Ex parte Jackin*, 13 Law J., Mag. Ca. 139.

REGINA v. CHARLES ENGLAND and CHARLES ROBINS.

A building erected not for habitation, but for workmen to take their meals, and dry their clothes in, which has four walls, a roof, a door, but no window, but in which a person slept with the knowledge, but without the permission, of the owner, is not a "house," the setting fire to which is felony, within the stat. 1 Vict. c. 89, s. 3.

ARSON.—The first count of the indictment charged, that the prisoner, on the 24th of March, 1844, at Machen, "feloniously, unlawfully, and maliciously, did set fire to a certain house of David Jones there situate, with intent thereby then and there to injure the said David Jones, against the form of the statute," &c. The second count was, for setting fire to a "certain out-house (a) of the said David Jones."

*534] It was proved by Mr. David Jones, that he occupied *lime-works at Machen, and that, thirteen years ago, he caused a small building to be erected there for his work-people at the kiln to eat their meals in and dry their clothes. That the building was seven feet high, and had four walls of stones, without mortar; the roof consisting of broom, turf, and straw, and being supported by two pieces of timber; that the door had neither lock nor bolt, and that there was no window in the building. Mr. David Jones further stated, that this building was not erected as a habitation, and none of his men had ever slept there; but that Thomas Williams was sleeping there without his (Mr. D. Jones's) permission; but that he was aware of his having done so for three weeks previous to the fire, he working on the roads, and having no cottage of his own. This witness further stated, that the building was called a shed, an out-house, and cabin, and was erected for the use of the lime-works. This building was set on fire.

W. H. Cooke, for the prisoners.—I submit that this building was not a "house" within the stat. 1 Vict. c. 89, s. 3. In the case of *Rex v. Smith*

(a) See the case of *Regina v. Jones*, ante, p. 303.

2 Ea. P. C. 497, it was held, that, if a porter lie in a warehouse for the purpose of watching the goods, this does not convert the warehouse into a dwelling-house, so as to make it a burglary to break into it in the night with intent to steal. So, in the case of *Rex v. Brown*, 2 Ea. P. C. 497, it was held, that a servant's lying in a barn in order to watch for thieves did not convert the barn into a dwelling-house.

Greaves, for the prosecution.—In the case of *Rex v. Smith*, 1 M. & Rob. 256, which was a case of burglary, the building alleged to have been broken and entered was a permanent one of mud and brick, on the down at Weyhill, used only as a booth for the purposes of the fair, for a few days in the year; it had wooden doors and windows bolted in the inside, and the prosecutor rented it for the week of the *fair, and he and his wife slept there every night of the fair, during one night of which, the offence [*535 was committed; and Mr. Justice PARK, after consulting Mr. Justice LITLEDALE, there held, that that was a sufficient dwelling-house for the purpose of burglary.

TINDAL, C. J.—There the person rented it as a house.

W. H. Cooke.—This hovel had no window in it.

TINDAL, C. J.—I have seen cottages that have had no windows in them.

W. H. Cooke.—But this, like the warehouse and the barn, was not built for a dwelling-house.

TINDAL, C. J.—This place never having been built for the habitation of man, and the person who slept there doing so without leave of the owner, I think, that it was not a “house” within this statute, although a cottage, however mean or wretched, used as the habitation of man, would be protected by its enactments. The prisoner must be acquitted.

Verdict—Not guilty.

Greaves, for the prosecution.

W. H. Cooke, for the prisoners.

*REGINA v. WILLIAM JENKINS and Four Others. [*536

In a case of rape against five, the prosecutrix, when before the grand jury, did not know the names of the different prisoners, but could identify the persons:—*Held*, that the grand jury might call in another witness, who was before the examining magistrate, and there saw the prisoners, and let the prosecutrix describe the different prisoners, and the other witness give their names; and that, if the prisoners could not be identified by this mode, they might be brought before the grand jury.

RAPE.—The prisoners had been committed on a charge of having ravished Ann Batt, and also on a charge of having robbed her of two shillings and four pence, a basket, and a number of other articles.

Mr. Morgan, the foreman of the grand jury, came into court, and stated that the grand jury found a difficulty in this case, as the prosecutrix did not know the prisoners.

TINDAL, C. J.—Does she know the persons, though she does not know the names?

Mr. Morgan.—She does.

TINDAL, C. J.—Some other witness will, no doubt, be able to affix the names. If, when the prosecutrix gives her evidence before you, some other witness who saw the prisoners before the examining magistrate be also before you, the prosecutrix can describe the persons as she saw them before the magistrate, and the other witness will give you the name of

each; but if the prisoners cannot be identified in this mode, they can be brought before you.

Sir *T. Phillips*, for the prosecution.—If a constable named Evan Richards is before the grand jury while the prosecutrix gives her evidence, he will be able to give the name of each prisoner whom the prosecutrix describes.

The prisoners were identified before the grand jury in the manner suggested by the Lord Chief Justice, without their being brought before the grand jury, who returned a true bill on each of the charges.

Sir *T. Phillips*, for the prosecution.

Huddleston, for the prisoner.

*537]

*GLOUCESTER ASSIZES.

(*Civil Side.*)

BEFORE LORD CHIEF JUSTICE TINDAL.

NEWTON v. HOLFORD, Esq., WILSON, and Three Others.

In an action of trespass against five for breaking into the plaintiff's house, in which the defendants have paid money into Court, the plaintiff cannot go into proof, (as evidence of malice,) that, nine months after the trespass, one of the defendants indicted him for perjury.

Evidence of the conduct of the parties before the trespass, if it had reference to it, might be receivable; but not evidence of the act of one defendant done by him long after the trespass.

TRESPASS.—The first count of the declaration stated, that the defendants, on the 5th of July, 1843, broke the outer-door of, and entered the dwelling-house of the plaintiff. *Second* count, for breaking the outer-door of the plaintiff's house, and assaulting his son and servant Francis Robert Newton, per quod servitium amisit. *Third* count like the second, but substituting the name of William Philip Newton for that of Francis Robert Newton. Plea—a payment into Court of £2; and that the plaintiff had sustained no greater damages. Replication, that the plaintiff had sustained greater damages.

It was opened by the plaintiff.—That the trespass was committed on the 5th of July, 1843, by breaking into and entering his house to take him on a writ of *capias ad satisfaciendum*, directed to the sheriff of Gloucestershire, of which county the defendant Mr. Holford was then high sheriff; and the plaintiff was going on to open, that, at the spring assizes of 1844, at Gloucester, the defendant Wilson indicted him (the plaintiff) for perjury.

TINDAL, C. J.—I think that you are not entitled to go into evidence of that. You sue five defendants for a joint trespass, and you propose to give
*538] in evidence a subsequent act of one of them. How can a subsequent act of the defendant Wilson affect Mr. Holford, the high sheriff?

The plaintiff.—Does not your lordship think that I may show malice?

TINDAL, C. J.—This is not an action for a malicious prosecution, but is an action for a joint trespass, committed by five persons. I think that you

might show the conduct of the parties before the trespass, if it had reference to it; but evidence of an act done by one defendant, long after the trespass, is, I think, not receivable.

The plaintiff.—I will not open that part of the case.^(a)

Verdict for the defendants.

The plaintiff in person.

Talfourd, Serjt., and *Greaves*, for the defendants.

(a) In the case of *Pearson v. Lemaitre*, 6 Scott, N. S. 607, which was an action for a libel, the plaintiff, in order to show *quo animo* the libel, which was the subject of the action, *was written*, gave in evidence two subsequent letters addressed by the defendant to third parties, containing substantially a repetition of the slanderous matter; and it was held, that they were properly received, though the libel declared on was free from ambiguity, and the letters given in evidence were written after the commencement of the action; and it was also held, that their admissibility was not affected by the lapse of time intervening between the writing of the respective letters.

* WESTERN SUMMER CIRCUIT, 1844. [*539

DORCHESTER ASSIZES.

(*Crown Side.*)

BEFORE MR. JUSTICE WIGHTMAN.

REGINA v. RICHARD JEANS.

In order to constitute a maiming of a horse within the stat. 7 & 8 Geo. 4, c. 30, s. 16, it is essential that a *permanent* injury should have been inflicted on the animal.

INDICTMENT against the prisoner, on the stat. 7 & 8 Geo. 4, c. 30, s. 16, for feloniously wounding a horse, the property of his master. A second count charged the prisoner with feloniously maiming the horse.^(a)

It was proved that, on the 26th of March, 1844, the prisoner was riding the horse along the road near Sherborne, and that the horse threw him, and dragged him some distance along the ground, and that the prisoner got up and laid hold of the tongue of the animal, a part of which was left in his hand, which he threw away. There was no evidence to show that the prisoner used any instrument, nor was it at all shown in what way this portion of the tongue of the animal had been separated from the residue; but it was stated by a veterinary surgeon, that it might possibly have been done by the tongue being drawn against a sharp tooth which the animal had. It was proved that the wound had healed, and that the horse was able to work as well as *before, the only injury resulting from the loss of the point of its tongue being, that it could not eat its corn [*540 quite so fast as before.

F. Edwards, for the prisoner.—I submit that this was not a wounding, as no instrument was used. From the cases of *Rex v. Owens*, M. C. C. 205, and *Rex v. Hughes*, 2 C. & P. 420, it appears that the use of some

(a) As to the punishment of these offences, see the stat. 1 Vict. c. 90, s. 2.

instrument is necessary to constitute a wounding. I submit also, that this was not a maiming of the horse, on two grounds: first, to constitute a maiming, the injury must be inflicted on some member of the animal's body, necessary for its defence, as the same rule must govern what is to be considered a maiming of an animal, as would decide the question with regard to the human frame; and, secondly, the injury inflicted here is only of a temporary character, and to constitute maiming the injury must be permanent.

Revan, for the prosecution.—I apprehend that the charge of wounding cannot be supported; but that this was a maiming. In the case of *Ree v. Owens*, pouring acid into the ear of a mare, which ran down from the ear into the eye and destroyed the sight, was held to be maiming.

WIGHTMAN, J., (having conferred with PATTESON, J.)—I have consulted with my brother PATTESON, and he agrees with me in thinking that the last objection of Mr. *Edwards* is a good one. There is no such permanent injury inflicted on the animal in this case as will support the count for maiming. The prisoner must be acquitted. Verdict—Not guilty.

Bevan, for the prosecution.

F. Edwards, for the prisoner.

*541] *NORTHERN SUMMER CIRCUIT, 1844.^(a)

DURHAM ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE CRESSWELL.

CHARLTON v. GIBSON.

A., by an agreement in writing, agreed to win stones, &c., "for the purpose of building" certain cottages:—*Held*, that parol evidence could not be given, to explain the sense in which the word "building" was used.

ASSUMPSIT for work and labour, money paid, and on an account stated. Pleas—1st, except as to £20, *non assumpsit*; 2dly, except as aforesaid, set-off; and, thirdly, as to the said sum of £20, payment into court.

The action was brought on an agreement to build certain cottages. The agreement was in the following terms:—

"Memorandum of agreement made between A. S., on behalf of the owners of Trinden Colliery, of the one part, and R. Charlton, of the other part. The said R. Charlton agrees to win stones, marle, and burn lime for the purpose of building sixty cottages at Trinden Colliery. Such materials to be led by the said R. Charlton, and delivered at the side of the cottages' sites as marked out, the owners laying a railway thereto. The stones and other materials to be supplied regularly and without hindrance or stoppage to the masons employed. The price to be 1s. 4d. per superficial yard.

(a) Reported by John A. Russell, Esq., B. A., of Gray's Inn, barrister-at-law.

This price includes for the delivery of such materials as above, and also railway dues."

*The above agreement was put an end to by the parties before [542 the whole of the cottages were built, and the work done was there-upon measured on the terms of the agreement. In addition, however, to the charge of 1s. 4d. per superficial yard for building, the plaintiff made a separate charge for tile-pointing and plastering the walls and floors of the cottages.

To the allowance of this separate charge,

Watson, for the defendant, objected. He contended, that the term "building," used in the agreement, must be taken to include tile-pointing and plastering; and that, therefore, the plaintiff was not entitled to charge extra for them. He also argued, that the contract involved such an ambiguity as to give him the right of calling witnesses, to show that the parties really used the term "building" in the sense for which he contended.

CRESSWELL, J., however, was of opinion that parol evidence was not admissible for the purpose of explaining the contract, (a) but that the construction thereof was for the court exclusively; and he also expressed himself to be of opinion, that the term "building," used in the contract, could not be taken to include the completion of the buildings by plastering and tile-pointing. Accordingly he directed the jury to find a

Verdict for the plaintiff.

Granger and Hindmarch, for the plaintiff.

W. H. Watson and Otter, for the defendant.

(a) See the law on this subject very fully and clearly stated in the opinions delivered by the judges in the case of *Shore v. Wilson*, (in Dom. Proc.,) 3 Clark & Fin. 499, 582; particularly in the opinions of Tindal, L. C. J., and Parke, B.

*DOE d. HINDMARCH and Another v. OLIVER. [543

The assent of a tenant at will is not necessary in order to perfect a livery of seisin.

THIS was an action of ejectment brought to recover possession of a dwelling-house and premises, situate in Barnard Castle, in the county of Durham.

It appeared that one H. Myers had lived on the premises in question from the year 1812 up to the year 1827. Prior to that time Oliver, the defendant, had married the daughter of H. Myers; and it was proved that when the latter quitted the premises in 1827, Oliver entered into the possession thereof, and that he had continued to reside upon them up to the time at which the present action was brought. It appeared, further, that before H. Myers quitted the premises he had married, and had had a son, to wit, J. Myers, who was one of the lessors of the plaintiff in the present action; Margaret Hindmarch, the other lessor of the plaintiff, had been the widow of H. Myers, and was now the widow of one Hindmarch, with whom she had intermarried after H. Myers's death. Proof was given that H. Myers had, some time before his decease, executed a deed of feoffment with livery of seisin of the premises in question, in favour of his son the said J. Myers; and that after the death of H. Myers, Oliver had been repeatedly requested to pay the rent for the said premises to J. Myers, but that he had refused to do so, alleging that he had a right to the said premises. J. Myers now claimed to recover by virtue of the aforesaid deed of feoff-

ment and livery of seisin. It appeared, however, that at the time seisin of the premises had been delivered to J. Myers, Oliver, who was then tenant in possession and present on the premises, did not assent thereto; and that J. Myers had made no previous demand of possession. Accordingly it was objected by

Addison, for the defendant, that the livery of seisin was void; and he cited, in support of his objection, Co. Litt. 48 b.

*544] **CRESSWELL*, J., however, was of opinion that Oliver was, at the time livery of seisin was made, merely a tenant at will; and that, this having been the case, his assent was not necessary in order to perfect the livery. (a)

Verdict for the plaintiff.

Bliss, for the plaintiff.

Addison, for the defendant.

(a) And see Com. Dig. *Feoffment*, B. 7; Dy. 18 b; 2 Rol. 4, l. 14.

WILSON v. ANDERSON.

A. was tenant of a farm over which two railways passed, in respect of which tenant's damages were payable to the owner of the land, or to his lessees or tenants. A. received the money:—*Held*, that, if the land covered by the railways passed to A. by the agreement under which he became tenant, the owner could not recover that money as money had and received to his use.

ASSUMPSIT for money had and received. Plea—*non assumpsit*.

This action was brought to recover certain sums of money, which the plaintiff alleged that the defendant had received to his use, under the following circumstances:—It appeared that the plaintiff was the owner of a farm, called the Dean-house Farm, of which the defendant was the tenant, and over which two railways passed. In respect of these railways, certain way-leave rents were payable by the Marquis of Londonderry and the Hetton Coal Company; and it appeared that these rents had been sold to the plaintiff when he purchased the estate. In addition to the way-leave rents, there was likewise a sum of £3 per acre reserved under a covenant to that effect, as tenant's damages, for the land occupied by the railways; and such sum was made payable by the covenant to the "persons seised or possessed, or entitled to the rents, issues, &c., of the said land, or his or *545] their lessees or tenants." At the time when the plaintiff bought the estate, the defendant was in the occupation of Dean-house Farm; and up to that time the aforesaid £3 per acre had been regularly received by him, as tenant's damages. He had likewise continued to receive the said sums since the plaintiff had become the owner of the property. The latter, however, claimed to be the party entitled to receive the said moneys; and it was in order to recover the same from the defendant, that the present action had been brought. In the agreement under which the defendant had become tenant to the plaintiff, no reservation of the sums payable as tenant's damages had been made to the latter.

Under these circumstances, it was contended by

Granger, for the defendant, that the plaintiff was not entitled to recover. It was clear, that, under the covenant whereby the sums payable for tenant's damages were reserved, such sums were of right payable to the tenant. But the true question was, had the land which was covered by the railways ever been severed from the farm; and he argued, that it was plain

that this had not been the case, inasmuch as it had been proved that the tenant's damages had always been paid to the tenant himself. Again, there was no reservation of the tenant's damages in the agreement entered into between the parties, and the payment was, therefore, properly made to the defendant.

Watson, contra, argued that the right to receive a money payment, such as that now in dispute, could not be taken to have passed to the defendant under a mere agreement to let the land.

CRESSWELL, J., in summing up, left it to the jury to say, whether the land covered by the railways formed part of the Dean-house Farm, and whether it passed by the agreement to the defendant. Because, if it did, he had *not received the money to the plaintiff's use, and the latter [*546 would not be entitled to recover.

Verdict for the defendant.

W. H. Watson, Ingham, and H. Griffith, for the plaintiff.

Granger and Robinson, for the defendant.

COLLINSON v. NEWCASTLE AND DARLINGTON RAILWAY COMPANY.

A railway act imposed a penalty on the company for the interruption of any road, and, in the case of a private road, made the penalty "payable to the owner thereof:"—*Held*, that the tenant of the farm over which the road passed could not sue for the penalty. The same act enacted, that any penalty imposed thereby, the recovery of which was not otherwise provided for, might be recovered by summary proceeding, upon complaint before two or more justices:—*Held*, that this did not bar the party entitled from his remedy by action at law.

THIS was an action of debt, to recover, under the provisions of the "Newcastle and Darlington Railway Act," (a) certain penalties for destroying a road. Plea—the general issue, by statute.

*The plaintiff in this case was the tenant of a farm in the town-ship of Skerningham, and it appeared, that, in order to get to Dar- [*547 lington Market, he had been in the habit of using a private road which passed through his farm, and which led into the main road from Durham to Darlington. The defendants, however, in cutting their railway, intersected the above road, so as to cut off the plaintiff's communication with

(a) 5 VICT. sess. 2, c. lxxx. ss. 263, 264. Section 263 enacts, "That, if, in the exercise of the powers by this act granted, any part of any road, whether carriage-road, horse-road, tram-road, or railway, either public or private, be found necessary to be gone across, cut through, raised, sunk, or taken, so that it will be so much injured thereby as to be impassable for, or dangerous to, travellers, passengers, or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made, instead of the road to be interfered with; and such substituted road shall, at the expenses of the company, be made and maintained in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as can be."

Sect. 264 enacts, "That, if the company do not cause another sufficient road to be so made before they interfere with any such existing road as aforesaid, they shall forfeit twenty pounds for every day during which such substituted road shall not be made after the existing road shall have been interrupted; and such penalty shall be paid to the trustees, commissioners, surveyor, or other person having the management of such road, if a public road, or, in case of a private road, to the owner thereof, and, when paid in respect of any public road, shall be applied for the purposes thereof."

the public road, and thereby prevent him from getting to Darlington, except by going a considerable distance round about; and it appeared, that, in order to do this, he was obliged to apply to his neighbours for leave to use their roads. This interruption was continued for a period of thirteen weeks.

The plaintiff's case being closed, it was submitted by

Wortley, for the defendants, that the plaintiff must be nonsuited. In the first place, the statute under which the plaintiff claimed enacted, that the penalties thereby imposed, in cases like the present, should "be paid to the trustees, commissioners, surveyor, or other person having the management of such road, if a public road, or, *in case of a private road, to the owner thereof*;" and he contended, that, under this enactment, the owner only, and not the occupier, was entitled to sue for the penalties in question. If the tenant was entitled to be indemnified under the statute at all, it must be under some one of the compensation clauses; (a) and if he were not, he was still entitled to a remedy against his landlord. But, in the second place, there was another question, namely, whether these penalties should not have been proceeded for summarily. Section *548] 357 of the act was as follows:—"And, for the purpose of providing for the recovery of penalties or forfeitures imposed by this act, or by any by-laws made in pursuance thereof, *the recovery of which is not otherwise provided for*, be it enacted, that every such penalty or forfeiture may be recovered by summary proceeding upon complaint made before two or more justices." Now the penalties sought to be recovered in the present case were penalties the recovery whereof was not otherwise provided for; they therefore came within the meaning of the above section, and should have been proceeded for in a summary manner, as therein directed.

CRESSWELL, J.—As to your second objection, you read the word "may" as if it were "must;" but besides this, no express remedy need be provided in order to entitle a party to sue for penalties imposed by an act of Parliament, and your argument, therefore, does not apply. On the other objection, namely, that the plaintiff in this case is the occupier merely, and not the owner, I shall direct the jury to find a verdict for the defendants.

Verdict for the defendants accordingly.

Knowles and Granger, for the plaintiff.

Wortley and Addison, for the defendants.

(a) See ss. 161—164.

*549]

*BEFORE LORD CHIEF BARON POLLOCK.

LAMB and Another v. NEWBIGGIN and Another.

A misjoinder in the declaration is no ground for nonsuiting the plaintiff at the trial.

Where a private river runs through a manor, the presumption of law is, that each owner of land within the manor and on the bank of the river has the right of fishing in front of his land; and if the lord claims a several fishery, he must make out that claim by evidence.

From the words of a deed under which the lord claimed, it was attempted to raise a presumption that the right of several fishery within the manor passed to him by that deed as appurtenant to the manor:—*Held*, that this presumption was rebutted by proof, that, before the date of that deed, owners of land within the manor and on the bank of the river had the right of free-fishery therein.

This was an action of trespass. The declaration contained several counts. First, for breaking and entering the close of the plaintiffs covered

with water, and with nets fishing in the said close for fish. Second, for breaking and entering the several fishery of the plaintiffs, and fishing in the said fishery for fish. Third, for breaking and entering the free-fishery of the plaintiffs, and fishing in the said fishery for fish. Fourth, for taking and carrying away the fish of the plaintiffs, and disposing thereof.

To this declaration there were several pleas, on which, respectively, issues were joined; and the principal question arising from these was, whether the plaintiffs possessed the exclusive right of fishing in that part of a certain manor called the manor of Crawcrook which abutted on the river Tyne.

The plaintiffs were lords of the said manor of Crawcrook. The defendants were the servants of one George Hill, who was the owner of land within the said manor, and which land abutted on the river Tyne. It appeared, that, by indentures of the 23d and 24th January, 1693, made between Ralph Carnaby and Sir John Swinburn, of the one part, and Robert Surtees and John Stevenson, of the other part, the said Carnaby and Swinburn conveyed to the said Surtees and Stevenson "All that their or one of their manor or township of Crawcrook, with all its rights, members, and appurtenances thereunto belonging, situate, lying, and being in the parish of Ryton, in the county of Durham, and also all that messuage, &c., and all that their or one of their free-fishery in the river of Tyne, then or then late in the tenure or occupation of the said Ralph Carnaby or his assigns;" Together with all "fishings, ponds, *pools," &c., "courts baron," &c. "To hold," &c.: and it was under [*550 this deed that the plaintiffs now claimed.

At the close of the plaintiffs' case,

Temple, for the defendants, submitted, that the plaintiffs should be nonsuited, inasmuch as there was a misjoinder in the declaration.

Pollock, C. B., however, refused to take notice of the objection, or to order the plaintiffs to elect on which of the counts of the declaration they would proceed, on the ground, that he had nothing to do but to look at the record, and to direct the jury on the issues there raised.

Temple then contended, that the deed of the 24th January, 1693, did not pass the fishery as one of the manorial rights, but as something distinct therefrom. As a general principle, the owner of the soil was entitled to the right of fishing in front of his land up to mid-stream; and the deed in question could not have been intended to pass more than this right. Indeed, this was plain from the deed itself, for the words there used were "free-fishery."

In confirmation of this view of the case, several deeds relating to various parts of the manor in question were then given in evidence; and, amongst others, a deed bearing date in the year 1672, which was a conveyance by the owner of part of the said manor called the "Stanners," together with "a free-fishery in the river of Tyne to the said premises belonging."

Murphy, Serjeant, in reply, argued, that it was evident, from the general wording of the deed of 24th January, 1693, that the fishery did pass as appurtenant to the manor, because the "court-baron," without which no manor could exist, passed in the same way.

Pollock, C. B., (in summing up.)—Claims of this kind *must [*551 be strictly proved, inasmuch as they are in derogation of the general common-law rights of her majesty's subjects.(a) The claim of the present plaintiffs extends to the right of fishing along the whole of that part of the

(a) And see per Lord Hale, 1 Mod. Rep. 106.

shore of the river Tyne which is within the manor of Crawcrook. Now the common-law presumption is, that, where land is possessed by different parties on either side of a river, the right of fishing in the river belongs to each *ad medium filum aquæ*. It has been argued on behalf of the plaintiffs, that, where a private river runs through a manor, the right of fishing along the shore thereof *prima facie* belongs exclusively to the lord. My opinion, however, is, that the presumption of law is the other way; and that whoever owns the land which abuts on the river must be taken to own the water in front thereof, and the right to fish there; so that, if the lord claims a several fishery, he must make out that claim by evidence.^(a) As to the indenture of the 24th January, 1693, the question is, what is the meaning of the term "free-fishery" used therein?—what did it convey? I think that you cannot infer that the fishery was of necessity disannexed from the manor by the way in which it was conveyed by that deed: but, on the other hand, it seems to me that that deed is, for the purpose for which it was put in by the plaintiffs, fully answered by the documents given in evidence on the part of the defendants, particularly by the deed of 1672, because each of those documents conveys a free-fishery, a right which the common law would have given to the owners of the soil within the manor, supposing there had been no evidence to the contrary. If, then, there was any free-fishery in the Tyne belonging to the "Stanners," this circumstance is, in my opinion, utterly destructive of the plaintiffs' case; but the deed of 1672, which is twenty-one years older than the

*552] *deed produced by the plaintiffs, appears to me to show that, in fact, this was so; and we may therefore, I think, conclude, that, by the term "free-fishery" in the indenture of the 24th January, 1693, there was intended to be passed nothing more than the same right of fishing, which, it appears, was claimed by every one who had land within the manor along the bank of the river.

Verdict for the defendants.

Murphy, Serjeant, *Robinson*, and *Udall*, for the plaintiffs.

Temple and *Otter*, for the defendants.

(a) See Hargrave's Tracts, Vol. 1, p. 5; and *The case of the Royal Piscary of the Banne*, decided in the King's Court in Ireland, Mich., 8 Jac., Davis's Reports, 57, l. 4.

NEWCASTLE ASSIZES.

(Civil Side.)

BEFORE LORD CHIEF BARON POLLOCK.

CHAPMAN v. ANNETT.

Where the drawer of a bill of exchange has had no notice of the dishonour thereof, but has subsequently promised to pay it:—*Seemle*, that such promise does not admit the notice, but merely waives it.

THIS was an action of assumpsit brought by the plaintiff, (who was the public officer of the Newcastle Bank,) as endorsee, against the defendant, as drawer of a bill of exchange. Pleas—1st, that the defendant did not make the bill; 2dly, that he did not endorse the said bill; 3dly, that he had not had due notice of the dishonour thereof.

Under the issue raised by the third plea, the following evidence was given:—A clerk of the bank was called, who stated, that it was his duty to give notice of the dishonour of all bills which were returned to the bank, and that he was in the habit of giving such notices accordingly. He *had, however, no recollection or belief on the subject of his having given notice of dishonour of the bill on which the present action was brought. He also stated, that he had had a conversation with the defendant about the bill, and that, in the course of that conversation, the defendant had said, that he would try to get Pringle, the acceptor, to pay it. [*553]

One Thompson, who was the agent of the bank, was then called; and he stated, that, after the bill had been returned to the bank, he likewise had had some conversation with the defendant, with reference thereto; that upon one occasion the defendant had said to him, that “he was anxious about the bill, as he thought that Pringle had not been prosperous in his speculations, and that he would call at his (Thompson’s) office, and have the matter arranged;” and that, on another occasion, the defendant had said that “he would have the bill taken up.”

Thompson likewise stated, that there was a book kept at the bank in which the previous witness should have made an entry of the notice. That book, however, was not produced.

Under these circumstances, it was submitted, by

Knowles, for the defendant, that he was entitled to a verdict on the third issue; and he contended that there was nothing in the conversations to which the witnesses had spoken, which amounted to evidence of a promise by the defendant to pay the bill; inasmuch as it was quite consistent with what had passed on those occasions, that he meant merely to endeavour to get the bill taken up by Pringle.

Watson, contra, argued that there was evidence of a promise by the defendant to pay the bill, and that such promise must be taken to admit every thing which it was necessary for the plaintiff to prove, in order to entitle him to maintain his action; and he referred, in support of this *position, to the cases of *Hopes v. Alder*, 6 East, 16; *Brett v. Levett*, 13 East, 213; and *Rogers v. Stephens*, 2 T. R. 713.(a) [*554]

POLLOCK, C. B.—The promise to pay does not necessarily admit the notice, although it may waive it. It appears to me, that in the present case the defendant’s conversations did amount to a promise to pay; but I am of opinion that there was no notice, and it is for the court to say what is, under these circumstances, the legal effect of the subsequent promise. At present I shall direct a verdict to be entered for the defendant on the third issue.(b)

Verdict for the plaintiff on the 1st and 2d issues, and for the defendant on the 3d.

W. H. Watson, and *Otter*, for the plaintiff.

Knowles, for the defendant.

(a) And see *Lundie v. Robertson*, 7 East, 231, and *Croxson v. Worthen*, 5 M. & W. 5.

(b) See on this subject the cases of *Hicks v. The Duke of Peaufort*, 5 Scott, 598; *Brownell v. Fenney*, 1 Ad. & E., N. S., 39; *Curlewis v. Corfield*, Id. 814; and *Pell v. Frankis*, 5 Scott, N. R. 460. From these cases it appears that evidence such as that which was given in the case reported in the text has, at least since the introduction of the new rules of pleading, been generally considered rather as evidence from which the jury might infer that the defendant had received a regular notice of dishonour, than as amounting to evidence that such notice had been waived: and it is clear, that, if this view of the case be the correct one, those decisions are not inconsistent with the New

Rules, inasmuch as the evidence given therein was admitted merely in order to decide the issue, whether notice had, in fact, been given or not. But if, on the contrary, according to the opinion intimated by the Lord Chief Baron in the above case of *Chapman v. Annett*, the subsequent promise to pay be rather a waiver of notice of dishonour, than *prima facie* proof that such notice has been given, then it would seem that the averment of notice in the declaration would not, under the New Rules, be supported by such evidence. See *Burgh v. Legge*, 5 M. & W. 418.

*555] *GEECKIE and Another v. MONCK, Bart.

Where a plaintiff had obtained from a judge at chambers an order for leave to amend his declaration on payment of costs, but had not made the amendment, the judge who tried the cause refused to allow the declaration to be amended at the trial, under the 3 & 4 Will. 4, c. 42, s. 23.

THIS was an action of assumpsit, on an agreement by the defendant to allow the plaintiffs to use the fodder and manure which were on certain premises let to them by the said agreement, according to good husbandry and the custom of the country, and to allow what should not be so used to remain on the premises; and alleging as a breach, that the fodder and manure were not so allowed to remain on the said premises, but were removed. There was a plea of payment of £11 into court, and an averment that the plaintiffs had sustained no damages *ultra*. On this averment issue was joined.

When the agreement was put in evidence, there appeared to be a variance between it and the contract set forth in the declaration. It likewise appeared, that an application had been made by the plaintiffs to a judge at chambers, in order to have the declaration amended, and that the learned judge had made an order, permitting the amendment to be made on payment of costs. The declaration, however, had not been amended.

Archbold, for the plaintiffs, now applied for leave to amend the declaration under the stat. 3 & 4 Will. 4, c. 42, s. 23.

POLLOCK, C. B., however, refused to allow the amendment. He doubted whether he had power under the statute to give leave to amend the declaration in the manner proposed; but whether this were so, or not, he could not, under any circumstances, have allowed the amendment in this case,—because leave had been given by a judge at chambers to have the amendment made on payment of costs, and as the plaintiffs had not taken advantage of that, he could not now make the order required.

The plaintiffs were therefore nonsuited.

*556] **Archbold* and *Udall*, for the plaintiffs.
W. H. Watson and *Otter*, for the defendant.

(Crown Side.)

BEFORE LORD CHIEF BARON POLLOCK.

REGINA v. MARK SHERWOOD.

Scille, if A. kill B. under provocation of a blow not sufficiently violent in itself to render the killing manslaughter, but the blow be accompanied by very aggravating words and gestures, that will be but manslaughter in A.

IN this case the prisoner was indicted for the murder of his wife.

It appeared, from the evidence of the niece of the deceased, that, on

the evening before the murder was supposed to have been committed, the prisoner and the deceased had been quarrelling, and that upon that occasion the deceased had been very violent, having made use of very aggravating language to the prisoner, as well as of very indecent and insulting gestures. In the course of the evening, however, the prisoner and his wife became in some measure reconciled; and the witness accordingly left their house, promising to call again on the following morning. On her return next morning, she found her aunt lying dead. The deceased had a wound in the throat, which the medical men considered had caused her death, and which they likewise considered had been inflicted with some sharp instrument, such as a razor. Within a short distance of the deceased, there was found lying a sweeping-brush; and it was in such a position, as that it might be supposed to have fallen from the hand of the deceased, presuming that a scuffle had taken place before the fatal wound had been inflicted.

Wilkins, (in addressing the jury for the prisoner,) *contended, [*557 that, although no provocation by words only would be sufficient to reduce the offence of murder to that of manslaughter, yet if the killing took place in consequence of the provocation caused by a blow, such as a box on the ear, such provocation would be sufficient for this purpose. He further argued, that assuming this to be the law, the prisoner must be taken to have been guilty of manslaughter only. The probability was, that the prisoner and the deceased had again quarrelled; that the latter, besides using language and gestures similar to those which she had used in the presence of her niece, had, upon this second occasion, struck the prisoner with the brush; and that it was in consequence of the provocation thus given, that the prisoner had made the assault upon her which had caused her death.

POLLOCK, C. B., (in summing up.)—I think the learned counsel for the prisoner has laid down his proposition too broadly. It is true that no provocation by words only will reduce the crime of murder to that of manslaughter; (a) but it is equally true that every provocation by blows will not have this effect, particularly when, as in this case, the prisoner appears to have resented the blow by using a weapon calculated to cause death. (b) Still, however, if there be a provocation by blows which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only. (c)

The prisoner was found guilty of murder.

* *Ingham* and *Unthank*, for the prosecution.

Wilkins, for the prisoner.

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(a) *Lord Morley's case*, Kel. 55; 1 Hale, P. C. 456.

(b) See, per Holt, C. J., in *Sedman's case*, Foster, C. L. 292.

(c) Mr. Justice Foster states the law on this subject in the following terms:—"Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder. Nor are indecent provoking actions or gestures, expressive of contempt or reproach, *without an assault upon the person*. This rule will, I conceive, govern every case where the party killing upon such provocation maketh use of a deadly weapon, or otherwise manifesteth an intention to kill, or to do some great bodily harm; but if he had given the other a box on the ear, or had struck him with a stick or other weapon not likely to kill, and had unluckily and against his intention killed, it had been but manslaughter." (Fos. Cr. L. 290, 291.) From this it would appear that that learned judge was of opinion, that, even where provoking words only

were used, yet, if the party resented them by a blow or with an instrument not calculated to produce death, he would be guilty of manslaughter only. And on this point the Judges were divided in opinion, in a case argued at Serjeant's Inn, 26 Car. 2, reported in Kelyng, 131.

APPLEBY ASSIZES.

(Civil Side.)

BEFORE LORD CHIEF BARON POLLOCK.

DOE d. ROBINSON v. BOUSFIELD.

If a copyholder make a lease which is not according to the custom of the manor, the lessee may nevertheless maintain ejectment thereon.

This was an action of ejectment.

It appeared that the defendant claimed to hold the premises in question as tenant from year to year of one Thomas Scott, who was customary tenant of the said premises; it further appeared, that, in the month of November, 1843, the said Thomas Scott had granted, by an instrument under seal, a term of twelve years in the said premises to Robinson, the lessor of the plaintiff; and this lease was now put in, in order to show Robinson's title. It was proved, however, that, in the manor in which the premises in dispute were situated, there was a custom that no one could lease *559] for a longer period than three years, without the license of the lord; and it was accordingly contended, by

Knowles, for the defendant, that the lease under which Robinson claimed was void, and that therefore the legal estate was not in him.

G. Atkinson, contra, argued, that, although (assuming the custom to exist) the lease in question might be void as against the lord of the manor, it was still a good and valid lease in so far as regarded all other parties, and in consequence afforded sufficient evidence of Robinson's title.

POLLOCK, C. B., thought, that, even if the lease were void by the custom as a lease for twelve years, it would still enure as a valid lease for three years; and that therefore it was sufficient to entitle the plaintiff to maintain his action.

Verdict for the plaintiff.

G. Atkinson, for the plaintiff.

Knowles and *Greig*, for the defendant.

In the next term *Knowles* moved to set aside the verdict; but the Court, (of Queen's Bench,) after time taken to consider, refused to grant a rule, on the ground that the lease was good against all parties except the lord, and that the lessee might, therefore, maintain ejectment thereon.(a)

(a) See the case of *Doe d. Tressider and others v. Tressider*, 1 Ad. & E., N. S., 416, and 1 G. & Dav. 70, in which the rule laid down on this subject in *Donningham's case*, Owen, 17, was recognised and acted upon by the Court of Queen's Bench. In that case it was resolved, "that, if a copyholder made a lease for years which is not according to the custom of the manor, yet this lease is good, so that the lessee may maintain an *ejectioe firmæ*; for between the lessor and the lessee, and all other, except the lord of the manor, the lease is good, and so hath it been several times adjudged in this court."

*LANCASTER ASSIZES.

[*560]

(Civil Side.)

BEFORE MR. JUSTICE CRESSWELL.

POLLITT v. FORREST and Others.

Where a farm was let under an agreement, and the agreement imposed a penalty on the tenant for selling hay produced on the premises, and gave the lessor power to recover the same "by distress as for rent in arrear:"—*Held*, that the lessor might so distrain, although the agreement was not under seal.

THIS was an action of replevin.

The circumstances under which the defendants claimed to be entitled to distrain upon the plaintiff were as follow:—On the 24th of February, 1840, a memorandum of agreement, not under seal, was entered into between James Forrest, Doctor William Forrest, Frederick Anderton Forrest, and John Charles Forrest, (the defendants,) of the one part, and William Pollitt (the plaintiff) of the other part, whereby the said defendants agreed to let to the said plaintiff a certain estate, farm, or tenement, with the appurtenances, from the 2d day of February then instant for the term of one year, and thenceforth from year to year, until the same tenancy should be determined by either giving to the other six months' notice in writing, at the yearly rent of £170. And the plaintiff thereby agreed, "that he would not break up or convert into tillage any meadow or pasture land under the penalty of £20 an acre, and so in proportion for a greater or less quantity, *to be recovered by distress as for rent in arrear*;" and "that he would not sell any hay, straw, or stubble produced upon the said premises, under the penalty of 2s. 6d. for each yard of hay, and of 20s. for each cart-load of straw or stubble, *to be recovered as aforesaid*." It appeared, however, that the plaintiff had sold certain quantities of hay and straw which had been produced on the said premises; and the defendants, in consequence, distrained upon him for the penalties imposed by the above agreement.

**Martin*, for the plaintiff, contended, that, as the instrument under which the defendants justified was not under seal, they could not distrain for the penalty thereby imposed, as if it were a rent-service, and that the distress therefore was illegal. [*561]

CRESSWELL, J., however, thought otherwise.

Accordingly there was a Verdict for the defendants.

Martin and *Atherton*, for the plaintiff.

Knowles and *Cowling*, for the defendants.

LIVERPOOL ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE CRESSWELL.

COOKE v. RIDDELIEN.

Where goods are sold by sample, evidence of a custom of trade as to returning or making an allowance for such of the goods as do not answer the sample, is receivable.

But in such a case the vendee cannot claim the benefit of the custom, if he have not elected to comply with it within a reasonable time.

ASSUMPSIT for goods sold and delivered.

It appeared that the plaintiff had agreed to sell to the defendant a quantity of mouseline-de-laines, by sample, the goods to be perfect in weaving. Before the whole of the goods were sent in, the defendant went from home. Shortly after this, a complaint was made to the plaintiff by a clerk of the defendant, that the goods did not answer to the sample, and that they were imperfect; and it appeared that the plaintiff thereupon *562] offered to make an allowance in respect of such imperfection, provided the goods were kept. The clerk, however, stated, in reply to this offer, that he was not authorized to enter into such an arrangement. Subsequently to this, and before the defendant returned, the plaintiff called several times at his place of business, and on one of these occasions the defendant's clerk again stated that he had examined the goods and found that they did not correspond with the sample. To this the plaintiff replied, that the goods must be taken with an allowance, or returned. The clerk, however, said that he had no authority to do either, but that, if the plaintiff would give him a written memorandum, he would return the goods on his own responsibility. This the plaintiff refused to do. It appeared further, that, after the complaint had been made as to the inferiority of the goods, the defendant accepted, on two several occasions, the remainder of the goods which he had ordered from the plaintiff, and that no part of the goods had ever been returned.

The point now made on behalf of the defendant was, that he was still entitled to an allowance from the plaintiff on account of the inferiority of the goods; and, in order to prove the custom of the trade in this behalf, a witness was called, who stated, first, the mode in which, in cases like the present, it was usual for parties to ascertain whether the bulk of the goods agreed with the sample; he next stated, that such of the goods as did not agree with the sample were set aside under the name of "rejects;" and he was then asked to state what was the custom of the trade with reference to making an allowance for or returning such "rejects."

Martin, for the plaintiff, objected to the question, on the ground that no such custom could be engrafted on a contract for the sale of goods by sample.

CRESSWELL, J., however, admitted the evidence.

*563] *Martin*, in his reply, then contended, that, as the defendant, although he had notice that the goods were not according to the contract, did not return such goods within a reasonable time, but retained them, he was bound to pay for them.

CRESSWELL, J., in summing up, said:—It may be a question whether the vendee is bound to pay according to the contract price of the goods, or whether he should pay according to their reduced value only. Under ordinary circumstances, a person who buys goods by sample may return them if they do not answer the sample, but he must do this within a reasonable time; and if, after objecting to the goods, he still retains them, he is bound to pay for them, making such a deduction as he may be entitled to by reason of their reduced value. (a) Here, however, a special custom has been proved with reference to the return of, or the allowance which should have been made for these goods; and it is, therefore, for you to say, whether the defendant, within a reasonable time, made his election whether to accept the goods entirely, or to retain them with the usual allowance. Verdict for the plaintiff.

Martin and Crompton, for the plaintiff.

W. H. Watson and Atherton, for the defendant.

(a) See *Street v. Blay*, 2 B. & Ad. 456, 463.

*ALDIS v. GARDNER.

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In *assumpsit* against an attorney for negligence, the fact of his having been retained as an attorney is put in issue by the plea of *non assumpsit*.

ASSUMPSIT.—The declaration stated in substance, that the plaintiff, at the request of the defendant, had retained and employed the defendant as an attorney, for fees and reward to him in that behalf, to lay out a certain sum of money, to wit, the sum of £300 on good security, and that, in consideration thereof, the defendant had promised the plaintiff to use due and proper care and diligence in and about the laying out of the said money. The declaration further alleged the receipt of the money by the defendant; and it then stated, that the defendant, not regarding his duty in that behalf, nor his said promise, did not nor would take due and proper care in and about the laying out of the said money, but, on the contrary, lent it to one B., who was insolvent.

The defendant pleaded, 1st, *non assumpsit*; 2dly, that he did not receive the money; 3dly, that he laid out the money properly; and, lastly, a set-off.

A variety of evidence was given for the purpose of showing, that, at the time the money was lent, B. was well known to be in insolvent circumstances; and some letters were then read, in order to prove the retainer of the defendant by the plaintiff. From one of these letters it appeared, that, after the plaintiff had determined on investing his money, the defendant had requested him to pay it in to his account with the Lancaster Bank; and another was read, in which, after acknowledging that the money had been paid in, he engaged to get the plaintiff £3 per cent. for it. From the whole tenor of the correspondence, it was evident, that the plaintiff and the defendant had been well acquainted, and that the latter had been on very friendly terms with his client.

Knowles, accordingly, in addressing the jury for the defendant, observed, that it was a question for them, whether *the plaintiff and defendant did or did not stand to each other in the relation of attorney and client in the transaction in question; and that, if they were of opinion that

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they did not stand to each other in that relation, the defendant would then be entitled to their verdict, provided they found that he had used as much diligence and care in laying out the plaintiff's money as he would have used had it been his own.

CRESSWELL, J.—Can that question arise? The defendant is stated in the declaration to have been retained as an attorney, and that allegation is not traversed.

Knowles submitted, that the allegation, that “the plaintiff, at the request of the defendant, retained and employed the defendant as an attorney,” formed part of the consideration for the defendant's promise, and that it was, therefore, put in issue by the plea of *non assumpsit*. And

CRESSWELL, J., in summing up, left it to the jury to say, first, whether the defendant was employed by the plaintiff as an attorney; and, secondly, whether, if he was, he exercised that degree of care which, as a professional man, the law imposed upon him, namely, a reasonable degree of skill, and proper diligence and attention, in order to discover the solvency of the party to whom the money was lent. (a) Verdict for the plaintiff.

*566] **Martin and Robinson*, for the plaintiff.

Knowles, W. H. Watson and Cowling, for the defendant.

(a) With reference to the point decided in the above case, see Reg. Gen. H. T., 4 Will. 4. The first of those rules states, that “in all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged;” and, as an example of the operation of this rule, the following is given; namely, “in actions against carriers and other parties for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.” Now to the cases put in this example, that reported in the text appears to be analogous, inasmuch as they are all cases in which the bailee is supposed to be sued for negligence; and as in them the plea of *non assumpsit* would operate as a denial of “such bailment or employment as would raise a promise in law to the effect alleged,” so it would seem to follow, that, in the present case, the plea must have the like effect: and that, therefore, the fact of the defendant being an attorney—that being the employment which raises the promise in law with the breach of which he is charged—is put in issue thereby.

DOE d. HOLT v. HORROCKS.

The statute 3 & 4 Will. 4, c. 27, s. 12, operates to make the possession of tenants in common a separate possession, from the time they first became tenants in common, and not merely from the time of the passing of that statute.

THIS was an action of ejectment brought to recover possession of an undivided moiety of certain messuages and premises situate at Chesham, in the county of Lancaster.

It appeared that one Robert Holt, by his will dated the 10th day of March, 1797, devised certain property (of which the premises in question formed part) to his wife for life, remainder to his sons John and Francis as tenants in common in fee. It appeared further, that, in the year 1819, and after the death of the wife of the devisor, the said John and Francis had entered into possession of the said premises; that John (who was the lessor of the plaintiff in this action) had continued in such possession until the present time; that Francis had continued in possession until the year 1826, when he died; and that the widow of Francis had remained in possession after his death, and had married Horrocks, the present defendant, who was now in possession of the said premises.

Under this state of facts, it was contended, by

**Hugh Hill*, for the plaintiff, that the possession of the one tenant in common was the possession of the other, up to the passing of [567 the statute 3 & 4 Will. 4, c. 27; (a) so that up to that time the Statute of Limitations did not run against the plaintiff: and that, as twenty years had not elapsed since the passing of that statute, the defendant had had no such exclusive possession of the premises in question as to bar the plaintiff's title to recover.

CRESSWELL, J., was of opinion contra; and he accordingly directed the plaintiff to be nonsuited, giving him leave to move.

Hugh Hill, for the plaintiff.

Barnes, for the defendant.

In the next term *Hill* moved accordingly in the Court *of Queen's Bench; but that court, on the authority of the case of *Culley v. Doe* [568 *d. Taylerson*, 11 Ad. & E. 1008, refused to grant a rule.

(a) By the 2d section of which it is enacted, "That, after the first day of December, 1833, no person shall make any entry or distress, or bring any action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

And by the 12th sect. it is enacted, "That, where any one or more of several persons entitled to any land or rent as co-parceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them." See the effect of these sections, in cases like the above, very fully considered in *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1008, 1015—1018.

GREGORY and Another v. WILLIAMS.

In a case for a libel against a co-partnership, the jury may take into their consideration, in estimating the damages to which the plaintiffs are entitled, the prospective injury which may accrue to the partnership from the defendant's act.

THIS was an action on the case for a libel.—Plea, not guilty.

The plaintiffs were slate-merchants and co-partners, and it appeared that they rented a slate quarry belonging to one Wynne, to whose agent, a person of the name of Hallows, they were in the habit of rendering accounts from time to time of the quarry. It further appeared, that the defendant had written a letter to Hallows, alleging that the plaintiffs returned fraudulent accounts of the said quarry. This was the libel complained of.

The plaintiffs' case being closed, it was argued by *Watson*, for the defendant, that the jury, in order to give damages to the plaintiffs, must find that a special co-partnership damage had, in fact, been sustained by them in consequence of the act of the defendant.

CRESSWELL, J., however, (in summing up,) observed:—It is said that you cannot give damages to the plaintiffs unless a special damage be proved to have happened to the partnership by reason of the defendant's act; but you must judge how far the partnership is likely to be injured by

that act. People may alter their mode of dealing with the partnership, and the libel may otherwise affect them hereafter; and you must take these *569] circumstances into your consideration in estimating the damages to which they are entitled.(a)

Verdict for the plaintiffs; damages £150.

Knowles and Crompton, for the plaintiffs.

W. H. Watson and James, for the defendant.

(a) And see *Ingram v. Lawson*, 8 Scott, 471, 477; in which case Bosanquet, J., observed:—"It is said that the damage sustained at the time of commencing the action is all that the plaintiff could recover, and that the jury were erroneously directed that they might take into account the prospective injury. But it appears to me, that the jury were warranted in proportioning the damages to the amount of injury that would naturally result from the act of the defendant, though it might not affect him until a subsequent period.

DRESSER v. CLARKE and Others.

Whether, in an action on a joint contract, one of several defendants who has suffered judgment by default may, since the stat. 6 & 7 Vict. c. 85, be called by the plaintiff to prove the contract—*quære!*

Where, at the trial of a cause, the counsel for the defendant had tendered a bill of exceptions, the judge, on a verdict being found for the plaintiff, refused to certify for speedy execution.

DEBT, for money lent, money paid, and on an account stated.—Pleas—1st, *nunquam indebtedatus*; 2dly, payment; and, 3dly, set-off.

The plaintiff in this action was the public officer of the "Yorkshire District Banking Company." The defendants were the sureties for the performance of a building contract; and it appeared that the work to which that contract referred had been stopped for want of money. The consequence of this was, that an arrangement was entered into between the sureties and the bank, for the purpose of inducing the latter to make advances in order to enable the sureties to carry on the work; and accordingly an account was opened, and advances were made by the bank, to recover the balance due in respect of which the present action *570] was brought. Clarke and all the other defendants, *except a Mrs. Whitaker, had suffered judgment to go by default; and in order to prove that the said Mrs. Whitaker was mentioned at the time the account was opened with the bank, as a person in whose name, jointly with those of the other defendants, that account was to be opened, the learned counsel for the plaintiff proposed to call the defendant Clarke.

Martin, for the defendants, objected, on the ground that the witness was not admissible.

Baines, contra, contended that the witness was admissible. The case of *Pipe v. Steele*, 2 Q. B. Rep. 733, was precisely in point; and in that case it was solemnly decided by the Court of Queen's Bench, that, where one of two joint defendants in an action on a contract has suffered judgment by default, he may, if not otherwise interested in procuring a verdict for the plaintiff, be called by him as a witness against the other defendant.

CRESSWELL, J., admitted the witness.(a)

(a) The statute 6 & 7 Vict. c. 85, s. 1, after enacting that witnesses are not to be excluded from giving evidence by incapacity from crime or interest, provides, "that this act shall not render competent any party to any such action or proceeding individually named in the record." It would appear, however, to be now well settled, that, where a defendant has suffered judgment by default, he is no longer a party to the issue or upon the record, but is taken to have been entirely removed therefrom; (see

Martin then tendered a bill of exceptions.

The jury having found a verdict for the plaintiff,

**Baines* applied to the learned judge to grant a certificate for [*571 speedy execution.

CRESSWELL, J., however, said, that he could not certify for speedy execution, as the counsel for the defendants had tendered a bill of exceptions in the cause.(a)

Baines and *Addison*, for the plaintiff.

Martin and *Tomlinson*, for the defendants.

per Lord Abinger and Alderson, B., in *Hawkenoorth v. Shawler*, 12 M. & W. 45, 48, 49;) and, such being the case, it follows, that he would not, under these circumstances, come within the meaning of the above proviso at all. The ruling of the learned judge in the case reported in the text would, therefore, seem to be quite consistent with the provisions of the statute referred to.

(a) In this case, a few days after the trial, *Baines* renewed his application for speedy execution. *Cresswell*, J., granted it, observing, that the case was a proper one for speedy execution, and that, if the tendering of a bill of exceptions were to be allowed to have the effect of defeating such an application, it would probably be done in every case.

CRELLIN v. BROOK.

A plea in abatement to an action *ex contractu* must, to be a good plea, set forth the names of all the parties with whom the defendant was joined as a co-contractor.

ASSUMPSIT for money had and received by the defendant to the use of the plaintiff, and on other common counts.—Plea—that the promises in the declaration mentioned were made by the defendant jointly with several others, (naming them,) who were still living, and who, before and at the time of the commencement of this suit, were and still are resident within the jurisdiction of the court, and not by the defendant alone; and concluding with a verification and the usual prayer of judgment, and that the writ, &c., might be quashed.

Replication and issue thereon.

It appeared that the defendant had been a shareholder in the “Isle of Man Joint Stock Bank;” that, whilst he was such shareholder, the plaintiff had deposited in that bank the sum of £1400; that some time afterwards the bank had stopped payment, and that, at the time of the stoppage, the balance due from the bank to the plaintiff amounted to the sum of 1254*l.* 16*s.* Witnesses were then called by the plaintiff, for the purpose of disproving the defendant’s plea; and from their testimony, it appeared that there were several other persons liable as shareholders in the bank, jointly with those named in the said plea, and that these persons [*572. were alive and within the jurisdiction of the court.

Martin accordingly submitted, that the defendant’s plea had failed.

Watson, contra, admitted, that, before the passing of the statute 3 & 4 Will. 4, c. 42, a plea in abatement must have contained the names of all the parties who were jointly liable with the defendant. This had been settled in the case of *Godson v. Good*, 6 Taunt. 587. But he submitted, that the 10th section of the 3 & 4 Will. 4, c. 42, had altered the law in this respect. By that section it was enacted, that, where a fresh action should be commenced after a plea in abatement had been pleaded in a former action, “if it should appear by the pleadings in such subsequent action, or on evidence at the trial thereof, that all the original defendants were liable, but that one or more of the persons named in such plea in abate-

ment, or any subsequent plea in abatement, were not liable as a contracting party or parties, the plaintiff should, nevertheless, be entitled to judgment, or to a verdict and judgment, as the case might be, against the other defendant or defendants, who should appear to be liable." Great doubts had arisen as to the meaning of the words "such plea in abatement, or any subsequent abatement;" because, if the first plea in abatement must necessarily contain the names of all the co-contractors, it was clear that there could be no "subsequent plea in abatement." That there might be such a plea, however, was, he submitted, plainly contemplated by the act. He, therefore, argued, that the direct issue on this plea in abatement must be taken to be, whether the others named therein were, in fact, jointly liable with the defendant; and that, if they were found to be so, the plea would be proved.

*573] *CRESSWELL*, J., however, was of opinion that such was not the meaning of the plea; but that its meaning was, that the promises stated in the declaration were made by the defendant jointly with those named in the plea, and by no others. (a)

The jury accordingly found a

Verdict for the plaintiff.

Martin and Cowling, for the plaintiff.

W. H. Watson and Robinson, for the defendant.

(a) And see per *De Grey*, C. J., *Abbott v. Smith*, 2 W. Black. 947; per *Gibbs*, C. J., *Godson v. Good*, 6 Taunt. 587, 595; *Steph. on Pl.*, ch. 2, sect. 7, rule 4, p. 463.

SMITH v. BOUTCHER.

Where A. employs B., a broker, to procure a charter for a ship, and B. employs C., another broker:—*Seemle*, that evidence of a custom of trade is admissible, to show which of the brokers is entitled to be paid the commission by A.

The body of the charter contained this clause: "The vessel to be consigned to C. & Co., Liverpool, or to their agents at her port of discharge in the United Kingdom; and in the margin was the following memorandum: "This charter subject to £5 per cent., payable by the ship:"—*Held*, that the jury might infer from the fact of A. having executed this charter, an implied contract by him to pay C. his commission.

ASSUMPSIT for work, labour, and commission.—*Plea non assumpsit*.

It appeared that the plaintiff was a ship and insurance broker residing at Liverpool, and that the defendant was a merchant and ship-owner residing in London; and the circumstances which gave rise to the present action were as follow:—In the month of February, 1843, the defendant, being desirous of obtaining a charter for one of his ships called the "Emmanuel Boutcher," employed a Mr. John Blackhall, who was a ship and insurance broker carrying on business in London, to procure such charter for him.

*574] Blackhall had been in the habit of corresponding with the *plaintiff; and it appeared that on this occasion various letters had passed between them, respecting the procuring of a charter for the defendant's ship. The plaintiff at length procured a charter for that vessel; and, on the 25th of February, 1843, he wrote to Blackhall, enclosing the charter, and requesting him to get it confirmed. Blackhall accordingly took the charter to the defendant in order to get his confirmation thereof; and on the 28th of February he again wrote to the plaintiff, enclosing the charter confirmed by him.

The charter was dated, "Liverpool, 21st of February, 1844;" in the body thereof there was the following clause:—"The vessel to be consigned

to Henry Smith & Co., Liverpool, or to their agents at her port of discharge in the United Kingdom;" and in the margin there was a memorandum as follows:—"This charter subject to £5 per cent., payable by the ship."

The charter subsequently went off, but not through any default of the plaintiff.

The point now in dispute between the parties was, whether the plaintiff, not having been employed by the defendant, but by Blackhall, to procure the charter in question, could recover in this action. And for the purpose of showing that he could so recover, it was proposed, in the course of the plaintiff's case, to ask a witness, what was the custom of Liverpool as to the party to whom the commission for procuring a charter should be paid, in cases where one broker had employed another to procure such charter.

Martin, for the defendant, objected to this question, on the ground, that the plaintiff must recover, if at all, as a matter of contract, and that evidence of the custom was not admissible.

Knowles and *Crompton*, contra, contended, that the evidence was admissible to show, that, although another broker might have had something to do in procuring the charter, still the broker actually procuring such charter was the party entitled to the commission; and they [*575 referred to the case of *Filken v. Faith*,^(a) in which it had been so held.

CRESSWELL, J., admitted the evidence.

In his address to the jury for the defendant, it was then contended, by

Martin, that Blackhall was the party entitled to the commission, inasmuch as he was the party whom Boutcher had employed; and that, as there was no privity of contract between the latter and Smith, Smith could not recover.

To support this view of the case, various letters were put in, particularly a letter from Smith to Blackhall, dated 23d February, 1843, in which the former, in writing to the latter about the charter in question and some others, said: "We shall have to third the commissions on these charters;" and one of the 10th March, likewise written by Smith to Blackhall, in which he said: "As a matter of course, you will charge the commission as stipulated;" and the inference sought to be drawn from these letters was, that Smith had, throughout the transaction, regarded himself as the agent of Blackhall only, and not as the agent of the defendant. Witnesses were likewise called for the purpose of proving that the defendant had never seen the plaintiff whilst the charter was being negotiated, and that he did not know that any one except Blackhall was engaged in procuring it; but it appeared, from the cross-examination of one of these witnesses, who had been the defendant's managing clerk during the progress of the negotiation in question, that he (the clerk) knew that Blackhall was corresponding with a broker in Liverpool as to getting the charter, and [*576 that he was likewise aware that a broker in Liverpool was getting the same, and did in fact get it.

Knowles, in reply, contended, that it was clear that the plaintiff was entitled to recover. He had procured the charter for the "Emmanuel Boutcher;" that charter had gone off without his default, and he was therefore justified in claiming his commission. It was said there was no contract between Smith and Boutcher; but he submitted, that the evidence

(a) Tried before Coltman, J., at the last Spring Assizes for Liverpool, but not reported. A rule is now pending in this case in the Queen's Bench.

clearly showed that Blackhall, who was Boutcher's agent, had employed Smith with his knowledge; and that was sufficient to constitute, at least, an implied contract. The charter itself must have given Boutcher notice that Smith was the broker who had procured it; and he could not now do away with the effect of such notice, by saying that he did not employ him, but another.

CRESSWELL, J.—The question in this case is, whether the defendant made a contract, express or implied, with the plaintiff, for procuring a charter for the ship Emmanuel Boutcher. It is not disputed, that, when the charter was procured, the broker was entitled to £5 per cent. from the ship-owner. Now, it appears that the charter in question was sent to Blackhall by the plaintiff; that Blackhall took it to Boutcher, and that it was sent back to the plaintiff executed by Boutcher. It is also clear that Boutcher and his clerk knew that a Liverpool broker was actually getting the charter. Then the charter was presented to the defendant in this form: "The vessel to be consigned to Henry Smith & Co., Liverpool, or to their agents at her port of discharge in the United Kingdom;" and from this it seems to me that he must have known that Smith really was the party by whom the charter had been procured. The margin of the charter likewise *577] contains this *memorandum: "This charter subject to £5 per cent., payable by the ship." Does not this imply, that the broker who had procured the charter did not look for payment from any intermediate party, but directly from the ship itself? and what inference are you to draw from the fact, that the defendant signed a charter containing such a memorandum? The letters do not appear to me to have any great bearing on the question; but, judging from those of the 23d February and 10th March, I would say that they show that the plaintiff throughout considered himself entitled to have control over the commission.

Verdict for the plaintiff.

Knowles and Crompton, for the plaintiff.

Martin and C. Edwards, for the defendant.

KIRKPATRICK v. TATTERSALL.

A bankrupt, after the issuing of the fiat against him, but before the granting of his certificate, promised in writing to pay a debt due by him before his bankruptcy:—*Held*, that this promise did not revive the debt, so as to enable the creditor to sue the bankrupt thereon in an action of *indebitatus assumpsit*.

ASSUMPSIT for goods sold and delivered, and on an account stated.

Pleas—1st, *non assumpsit*; 2dly, that after the making of the said promises the defendant became a bankrupt within the true intent and meaning of the statutes then in force concerning bankrupts, and that the alleged causes of action accrued to the plaintiff before the defendant so became a bankrupt. The plaintiff joined issue on the first plea, and replied to the second, alleging a promise by the defendant, after his bankruptcy, to pay to the plaintiff the sums of money in the declaration mentioned; whereupon issue was joined.(a)

It appeared that the defendant had become bankrupt subsequently to the

(a) In the report of this case, it is stated that the plaintiff replied to the second plea, "alleging a promise by the defendant, after his bankruptcy, to pay the plaintiff the sums of money in the declaration mentioned." This is incorrect. The defendant's second plea concluded to the country, and the plaintiff's replication to it *u similiter*.

accruing of the original debt in respect *of which this action was brought; that his certificate was dated the 20th of February, and [578 that it was allowed on the 13th of March, 1844. After the date of the fiat, however, and before the 20th of February, the defendant wrote to the plaintiff in the following terms:—"In consideration of your services, I agree to pay the debt due from me to you before my bankruptcy;" and it was contended, on behalf of the plaintiff, that this promise was a sufficient answer to the defendant's plea.

Knowles and *Cowling*, for the defendant, contended that it was not sufficient.—The words of the 121st section of the 6 Geo. 4, c. 16, were: "And be it enacted, that every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands hereby made provable under the commission, in case he shall obtain a certificate of such conformity so signed and allowed, and subject to such provisions as hereinafter directed." Then sect. 131 enacted, "That no bankrupt, after his certificate shall have been allowed under any present or future commission, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement made or to be made after the suing out of the commission, unless such promise, &c., be made in writing, signed by the bankrupt, or by some other person thereto lawfully authorized in writing by such bankrupt;" and the effect of these sections was, that until the bankrupt had obtained his certificate, the original debt was in full force. The subsequent promise, therefore, if made before the granting of the bankrupt's certificate, could be of no avail, because it revived nothing. At all events, it could be of no avail unless it were made on a new consideration; and then the *declaration, instead of being on the common counts, [579 should have been on the new promise, founded on the new consideration. They therefore submitted, that the production of the bankrupt's certificate must put an end to the present action.

Martin and *Crompton*, contra, argued, that there was a valid debt due from the defendant at the time the fiat issued, and that such debt continued to be due down to the 20th of February. At that time, therefore, the plaintiff could have recovered against the defendant on an account stated, because of the admission of the latter, and the certificate did not touch that debt. They also contended, that there was nothing in the sections of the Bankrupt Act on which the other side relied, which at all invalidated a promise made by the bankrupt after the date of the fiat, although before the certificate; and, further, that there was no necessity to declare specially on the new consideration.

CRESSWELL, J., was of opinion, that the plaintiff had not succeeded in supporting his replication, because, at the time the subsequent promise was made, he could still have sued the defendant on the original debt; and he therefore directed him to be nonsuited.

The plaintiff was nonsuited accordingly.

Martin and *Crompton*, for the plaintiff.

Knowles and *Cowling*, for the defendant.

*580]

*FARRAR v. DEFLINNE.

If the fact of a man being a dormant partner in a firm become known, and on his retiring from the firm notice of that circumstance be not given to those persons who were aware of his being such partner, he will be liable to those persons for debts contracted by the firm after his retirement therefrom.

ASSUMPSIT on several bills of exchange, and for goods sold and delivered, money lent, and on an account stated.

It appeared that the defendant and a person of the name of Todd had been in partnership from the year 1834 until the year 1837. The defendant was merely a dormant partner, and on his retirement from the firm, the dissolution of partnership was not advertised. The claims in respect of which the present action was brought had accrued subsequently to the dissolution; but a large mass of evidence was given for the purpose of fixing the liability of the defendant, on the ground that the plaintiff had been aware of his being in partnership with Todd, and that he had not been made acquainted with the fact that they had ceased to be partners.

CRESSWELL, J., in summing up, said:—Todd and the defendant were once in partnership, but they have not been so since the year 1837. The plaintiff dealt with the firm during the partnership, and he continued to do so afterwards; and the question is, whether the defendant is liable in respect of such subsequent dealings now that the partnership is dissolved. The law stands thus: If there had been a notorious partnership, but no notice had been given of the dissolution thereof, the defendant would have been liable. If there had been a general notice, that would have been sufficient for all but actual customers; these, however, must have had some kind of actual notice. If the partnership had remained profoundly secret, the defendant could not have been affected by transactions which took place after he had retired; but if the partnership had become known to any person or persons, he would be in the same situation, as to all such persons, as if the existence of the partnership had been notorious. The question for you, *581] therefore, is, was this partnership actually known *to the plaintiff, either by general report, or by direct communication? Because, if it were, and he did not know, either from notice of the fact, or from surmise, that the dissolution had taken place, you must infer that he still dealt on the faith of the partnership, and the defendant will therefore be liable.(a)

Verdict for the plaintiff.

Baines, Tomlinson, and Cowling, for the plaintiff.

Thesiger, S. G., Dundas, W. H. Watson, and Brandt, for the defendant.

(a) And see the observations of Lord Kenyon in the case of *Evans v. Drummond*, 4 Esp. 88, 90.

WILLIAMSON v. PAGE.

In an action against the owner of a ship, to recover money advanced to the captain for the use of the ship whilst in a home port—*Held*, that the only question for the jury was, whether, under the circumstances, the captain's position was such as to constitute him the authorized agent of the owner, in order to procure such advances, and that the state of the accounts between the captain and the owner at the time had nothing to do with the case.

ASSUMPSIT for money lent, and on an account stated.—Pleas—1st, except as to the sum of £15, *non-assumpsit*; and, 2dly, as to that sum, payment into court.

The plaintiff in this action was a ship-broker residing at Belfast; the defendant was the owner of a ship called the “*Adventurer*,” and resided at Scarborough; and the action was brought to recover moneys which had been advanced by the plaintiff to the captain of the “*Adventurer*,” for the purpose, as was alleged, of making necessary disbursements on account of the ship.

It appeared, that, prior to the time at which the money was advanced by the plaintiff, the ship had made several voyages to various places, by means of which she had been kept for some time at sea; there was also evidence that the captain had received various sums of money on account of freights which had been earned by the ship; and an attempt was made to prove that, at the time the money was borrowed, the captain had funds in hand arising from such freights to a greater amount than was requisite to pay for the stores which he had purchased, and to meet the other disbursements which he had made on the ship’s account. Part of the money had been advanced for the captain’s own use. [*582]

Watson, for the defendant, argued, that, in order to render the owner of a ship liable for moneys advanced to the captain for necessities whilst the ship was in a home port, it must appear that the captain had not only been without money, but that he could not have purchased such necessities on credit; and, further, that a person had no right to lend money to the captain of a vessel whilst in a home port, without previously communicating with the owner, in order to ascertain whether he was authorized to borrow such money, or not; and he referred to *Rocher v. Busher*, 1 Stark. 27; *Arthur v. Barton*, 6 M. & W. 138; *Johns v. Simons*, 2 Q. B. Rep. 425; *Stonehouse v. Gent*, Id. 431; and *Abbott on Shipping*, 142, 7th edit. Here, however, no communication had been made to the owner until after the money was advanced. Again, the captain had received various sums for freight earned by the ship; and had the plaintiff made proper inquiries, he might have discovered this. There was, therefore, no necessity at all to justify the borrowing; but, admitting that there had been, the plaintiff should still have communicated with the owner. The money claimed in this action had thus been wrongfully lent, as against the owner, and, therefore, the plaintiff was not entitled to recover.

Martin, contra, contended that there was no sufficient evidence, that, at the time the money was borrowed, the captain was in funds; on the contrary, there was evidence *that a considerable part of the money he had received had been paid away for the use of the ship; and as she had been voyaging about for a long while, the probability was that the remainder had likewise been disposed of in the same way. He also argued, that it was not necessary for a party making advances to the captain of a ship, under circumstances like those of this case, to communicate with the owner before making such advances. [*583]

CRESSWELL, J.—The plaintiff cannot recover in this action for money advanced to the master for his own use. With reference to his right to recover in respect of the moneys advanced by him for the use of the ship, I will read to you a passage from a book of some authority on the subject. “As the master in general appears to all the world as the agent of the owners, in matters relating to the usual employment of the ship, so does he also in matters relating to the means of employing the ship; the business

of fitting out, victualling, and manning the ship being left wholly to his management in places where the owners do not reside, and have no established agent, and frequently, also, even in the place of their own residence. His character and situation furnish presumptive evidence of authority from the owners to act for them in these cases, liable, indeed, to be rebutted by proof that they, or some other person for them, managed the concern in any particular instance, and that this fact was actually known to a particular creditor, or was of such general notoriety that he cannot be supposed to be, because he ought not to have been, ignorant of it, or that they were, by the terms of the contract, expressly excluded." Abbott on Shipping, 134, 7th edit. Some nice distinctions have been introduced by modern cases, which make it a matter of some doubt, how the law, as stated in the passage I have just read, should be applied; but the question which I *584] shall leave to you is this: were the circumstances of the present case such as to raise a presumption, that the master was the agent of the owner, in order to procure the means of employing the ship? And if you think that the captain's position was such as to constitute him the authorized agent of the owner for that purpose, you must find for the plaintiff. This is the only question you have to try. The state of the accounts between the master and the owner, about which so much has been said, has, in my opinion, nothing to do with the case.

Verdict for the plaintiff.

Martin, Murphy, Serjt., and *Robinson*, for the plaintiff.

W. H. Watson and *Webster*, for the defendant.

DUCKWORTH v. JOHNSTON.

In order to show that the defendant, in an action for goods sold and delivered, was not liable, it was proposed to ask a witness, whether the plaintiff's wife had said any thing to him as to the person whom her husband had trusted for the goods:—*Held*, that the question could not be put.

DEBT for goods sold and delivered.—Pleas—1st, except as to part, *nunquam indebitatus*; 2dly, as to that part, a tender before action brought.

The goods for the price of which this action was brought were alleged by the plaintiff to have been supplied by the order of the defendant, who was one of an election committee; and in order to show that, in fact, this had not been the case, the learned counsel for the defendant proposed to ask a witness, whether the wife of the plaintiff had said any thing to him as to the person whom her husband had trusted for the goods, and to whom he looked for payment.

Wortley, for the plaintiff, objected to this question.

*585] **CRESSWELL*, J., allowed the objection.(a)

Verdict for the plaintiff.

Wortley and *Cardwell*, for the plaintiff.

Baines and *Segar*, for the defendant.

(a) In what cases such evidence is admissible, see *Emerson v. Blonden*, 1 Esp. 141; *Anderson v. Sanderson*, 3 Stark. 204; *Clifford v. Barton*, 1 Bing. 199; *Palmer v. Sells*, 3 Nev. & M. 422.

WHARTON v. WRIGHT.

In an action against the endorser of a bill of exchange, a memorandum in writing, made by the defendant's wife, of the receipt of notice of dishonour at the place from which the bill was dated, (the defendant himself not having been resident there at the time,) is admissible, after the death of the wife, to prove that the defendant had due notice of dishonour.

ASSUMPSIT by the endorsee against the endorser of a bill of exchange.—The only material plea was, that the defendant had not due notice of the dishonour of the bill.

On this point the evidence was, that, at the time the bill in question became due, the defendant was employed on various railways throughout the country, and he did not appear to have had, at that time, any fixed place of residence. The bill of exchange, however, was dated from a place called "The Brunswick Hotel;" and it was proved that a notice of dishonour had been sent to the defendant, addressed to that place. This notice had been received by the defendant's wife, and it appeared that she had made a memorandum in writing of having received such notice. The wife of the defendant being now dead, it was proposed to put in this memorandum, as evidence that the defendant had had due notice of the dishonour of the bill.

Martin, for the defendant, objected to the reception of the evidence, because the memorandum in question had been made by a person who was neither an agent of the defendant, nor a party to the cause.

*CRESSWELL, J., however, overruled the objection, and admitted the evidence. Verdict for the plaintiff. [*586]

James and Atherton, for the plaintiff.

Martin and Webster, for the defendant.

HAWORTH v. WHALLEY.

Where countermand of notice of trial is given after the commission day, and the record is not withdrawn, the proper course is, on the cause being called on, to nonsuit the plaintiff.

In this case countermand of notice of trial had been served on the defendant, but not until after the commission day, and the record had not been withdrawn. On the cause being called on for trial,

Cardwell, for the defendant, moved for the costs of the assize.

CRESSWELL, J., said, that, as the record was in court, that motion could not be acceded to.

Cardwell then said, that he would take a verdict for the defendant.

CRESSWELL, J.—You cannot do that, as the plaintiff is not present to hear the verdict. The proper course is to nonsuit the plaintiff.

The jury were sworn, and the plaintiff was called accordingly.

*BENTLEY v. FLEMING.

[*587]

If the inventor of a machine lend it to another in order to have its qualities tested, and that other use it for some weeks in a public work-room; this is not giving the invention such publicity as to deprive the inventor of his right to obtain letters-patent there for it.

A machine does not cease to be the subject of a patent, merely because of the length of time during which the inventor may keep it by him, after it has been made a complete workable machine.

CASE for the infringement of a patent.

The patent in question had been obtained for making a card-machine ; and there was evidence, that, about five or six weeks before the letters-patent were obtained, the inventor, one Thornton, had lent the machine to one N., in order that he might try whether it would set the teeth of the cards. There was also evidence that N.'s room was in a mill, and that men were constantly going backwards and forwards to and from the said room. It appeared, moreover, that for some weeks before the time at which the machine was lent to N., it had been in complete working condition.

On this evidence, it was submitted, on the part of the defendant, that the plaintiff was out of court,—first, on the ground that the machine had been publicly used in N.'s room, which was a public room, before the granting of the letters-patent ; and on this point the case of *Wood v. Zimmer*, Holt, N. P. C. 158, was referred to.

CRESSWELL, J.—Have you any case that goes that length? The case referred to was the case of an absolute sale ; but here there is no evidence that the machine was given to N. for the purpose of his giving it publicity. The evidence merely is, that Thornton lent the machine to N., in order that he might discover whether it really was worth while to take out a patent for it, or not. I cannot stop the case on that point.(a)

*588] *It was then submitted, secondly, that, inasmuch as the machine in question was a complete workable machine for a long period before the letters-patent were taken out, it did not form the subject of a patent at all.

CRESSWELL, J.—A man cannot enjoy his monopoly by procuring a patent, after having had the benefit of the sale of his invention. But you cannot contend, that if a man were to keep his invention shut up in his room for twenty years, that circumstance merely would deprive him of his right to obtain a patent for it.

W. H. Watson, Rotch, and Webster, for the plaintiff.

Knowles, Baines, Addison, and Cowling, for the defendant.

(a) In the recent case of *Carpenter v. Smith*, 9 M. & W. 300, Alderson, B., said, (p. 303) :—"Public use means a use in public, so as to come to the knowledge of others than the inventor, as contradistinguished from the use of it by himself in his chamber;" and in the same case, it was said by Lord Abinger, (p. 304,) that "the 'public use and exercise' of an invention meant a use and exercise in public, and not by the public." So, in the case of *Morgan v. Seaward*, 2 M. & W. 544,—in which the objection to the novelty of the invention was, that the machine which was alleged to have been invented had been constructed, not by the patentee himself, but by a third party at the factory of the latter, and in which the court gave judgment in favour of the validity of the patent,—much stress was laid on the fact, that such third party not only constructed the machine under an injunction of secrecy from the patentee, but, further, that the machine itself, when completed, was not shown or exposed to the view of those who might happen to come to the factory ; and it was said, that these circumstances made the case, so far, the same as if the machine had been constructed by the inventor's own hands in his own private workshop, and no third person had seen it whilst in progress. (Per Parke, B., delivering judgment in *Morgan v. Seaward*, 2 M. & W. 558.) In the case reported in the text, however, the evidence was, that the room in which the machine was used was a public room ; and the ground of the learned judge's opinion was simply, that, although the room was public, still the machine had been placed there for the purposes of experiment only ; and that, therefore, this did not constitute a public use and exercise thereof, within the meaning of the laws relating to patents of invention. The above case, therefore, would seem to carry the law on this subject further than it has been carried by any previous decision.

WELCH SUMMER CIRCUIT, 1844. [^{}589

CARDIFF ASSIZES.

BEFORE BARON ROLFE.

REGINA v. ANN WILLIAMS and JOHN REES.

The delivery of poison to an agent, with directions to him to cause it to be administered to another under such circumstances that if administered the agent would be the sole principal felon, is not an "attempt to administer poison," within the stat. 1 Vict. c. 85, s. 3.

A. delivered poison to B., and desired him to put it into V.'s beer, for that he (A.) wanted to kill V. B. delivered the poison to V., and told him what had passed between A. and himself:—*Held*, that A. could not be convicted on the stat. 1 Vict. c. 85, s. 3, of having attempted to administer poison to V.

INDICTMENT on the stat. 1 Vict. c. 85, s. 3.—The first count of the indictment charged the prisoners with feloniously *attempting to administer* to one Thomas Vaughan a large quantity of a certain deadly poison, called white arsenic, with intent to kill and murder him. There was also a *second* count, charging the prisoners in like manner with attempting to administer poison to Mary Vaughan, with intent to kill and murder her; and a *third* count, charging them with attempting to administer poison to Thomas and Mary Vaughan, with intent to kill and murder both.

It appeared that the two prisoners cohabited together, the female prisoner being a daughter of Mary Vaughan; and that, in the month of May, 1844, the prisoners procured some arsenic, and gave it, in a paper, to a man named Richard Edwards, informing him that it was poison, and that they wanted to kill Vaughan and his wife; and they gave directions to Edwards to keep the arsenic in the palm of his hand, and go to Vaughan's house, which was two or three miles distant, and there call for a pint of beer, which he, Edwards, and the Vaughans were to drink together, and after having done so, he (Edwards) was to call for another pint of beer, and take an opportunity of slipping the arsenic into it, undiscovered by the Vaughans, *to whom he was to hand it, that they might drink it and [^{*}590 be poisoned. The prisoners gave Edwards 5*d.* for his services, and told him, that if he succeeded he should never want, for all in the Vaughans' house belonged to the prisoner Ann Williams. It further appeared that Edwards immediately proceeded to the house of the Vaughans, and gave up the poison to them, and told them all that had passed. Edwards was a man of apparently rather weak intellect, but gave his evidence in a very clear and collected manner, and was certainly perfectly aware that, if he had done as he was directed, he must have destroyed the Vaughans.

Verdict—Guilty.

ROLFE, B., resented the judgment, in order to consult the judges on the point, whether the foregoing facts warranted the conviction of the prisoners for an attempt to administer poison; for if Edwards had administered the poison, he would have been the sole principal felon, and the prisoners would have been accessories before the fact. The question, therefore, was, whether the delivery of poison to an agent, with directions to him to

cause it to be administered to another, under such circumstances that, if administered, the agent would be the sole principal felon, was an "attempt to administer," within the third section of the stat. 1 Vict. c. 85.

E. V. Williams and *E. L. Richards*, for the prosecution.

In the ensuing term the case was considered by the fifteen judges, who held the conviction wrong.

*591]

*CHESTER ASSIZES.

(*Crown Side.*)

BEFORE BARON ROLFE.

REGINA v. WILLIAM NEALE.

If, on the trial of an indictment for a misdemeanor in carnally knowing and abusing a girl between the ages of ten and twelve, it appears that the defendant effected his purpose by force, and against the girl's will, this is no ground of acquittal.

MISDEMEANOR.—The indictment charged the defendant with having carnally known and abused Ann Smith, a girl above ten and under twelve years of age.

The case was clearly proved; but the girl, Ann Smith, in answer to a question put to her in cross-examination, said, that she did not consent to the act of the prisoner, and that he effected his purpose by force, and against her will.

Townsend, for the defendant, submitted, that on this evidence the defendant was entitled to be acquitted, as the offence amounted to a rape.

W. Yardley, for the prosecution.—Every allegation in the present indictment is proved, and the further proof of the non-consent of the child does not disprove any part of the present charge.

ROLFE, B.—I think the case must go to the jury.

Verdict—Guilty.

After the verdict was returned, the jury, in answer to a question put to them by *ROLFE, B.*, stated that they were of opinion that the prisoner did effect his purpose by force, and against the child's will.

*592] **ROLFE, B.*, reserved the case for the opinion of the fifteen judges, on the question whether the conviction was right; and the case having been considered by them in the ensuing term, their lordships held, that the conviction was right.

W. Yardley, for the prosecution.

Townsend, for the defendant.

NORFOLK SUMMER CIRCUIT, 1844.

SUFFOLK ASSIZES.

(Crown Side.)

BEFORE BARON ALDERSON.

REGINA v. ROBERT GOWER GRIMWADE.

A. wrote a threatening letter addressed to Sir J. R., threatening to burn the house, &c., of Mr. B., a tenant of Sir J. R. A. left the letter, which was sealed, at a gate in a road near Sir J. R.'s house, where it was found and taken to the steward's room at Sir J. R.'s, where it was opened and read by the steward, and by him given to E., a constable, by whom it was afterwards shown to Sir J. R. and to Mr. B.:—*Held*, that if, in thus leaving the letter, the prisoner intended the letter should not only reach Sir J. R., but also reach Mr. B., this was a "sending" of the letter to Mr. B., within the stat. 4 Geo. 4, c. 54, s. 3.

INDICTMENT on the stat. 4 Geo. 4, c. 54, s. 3.—The first count of the indictment charged, that the prisoner, on the 2d day of April, 7 Vict., with force and arms, at, &c., "knowingly, wilfully, and feloniously did send to Sir Joshua Ricketts Rowley, Baronet, a certain letter, with a certain fictitious signature, to wit, the signature 'A Polstead labourer,' subscribed thereto, directed to the said Sir Joshua Ricketts Rowley, Baronet, by the name and *description of 'Sir Joshua Rowley, Bart., Stoke, Suffolk,' threatening to destroy the house, out-houses, barns, stacks of [*593 corn, grain, hay, and straw, the property of the said Sir Joshua Ricketts Rowley, Baronet, a subject of our lady the queen, then and there being; which said letter is as follows, that is to say:—

" 'Sir,—This is to inform you, that, unless your tenant, Mr. Brown, of Polstead, pay his men an advance of wages, the present being 8s. per week for twelve hours' labour, he will be visited with a blaze; but your timely interference may prevent the intended calamity.

' A Polstead labourer.

" 'P. S.—Mr. Brown's 8s. per week and 30s. per week for a policeman will not do; not but what an 8s. labourer wants looking after, for it is impossible for that man to live honestly without getting into debt; he is the only one in the parish at 8s.:' against the form of the statute," &c.

The *second* count charged, that the prisoner, on, &c., with force and arms, at, &c., "knowingly, wilfully, and feloniously did send to one William Brown a certain letter, with a certain fictitious signature, to wit, the signature 'A Polstead labourer,' subscribed thereto, directed to Sir Joshua Ricketts Rowley, Baronet, by the name and description of 'Sir Joshua Rowley, Bart., Stoke, Suffolk,' threatening to burn and destroy the house, out-houses, barns, stacks of corn, grain, hay, and straw, the property of the said William Brown, a subject of our lady the queen, then and there being, which said letter is as follows, that is to say: [setting out the letter as in the first count:] against the form of the statute," &c.

The *third* count charged, that the prisoner, on, &c., with force and arms, at, &c., "knowingly, wilfully, and feloniously did send to Sir Joshua Ricketts Rowley, Baronet, a certain letter, with a certain fictitious signature, to wit, the signature 'A Polstead labourer,' subscribed thereto,

*594] directed to the said Sir Joshua Ricketts Rowley, Baronet, by *the name and description of 'Sir Joshua Rowley, Bart., Stoke, Suffolk,' threatening to burn and destroy the house, out-houses, barns, stacks of corn, grain, hay, and straw, the property of one William Brown, a subject of our lady the queen, then and there being; which said letter is as follows, that is to say: [setting out the letter as in the first count:] against the form of the statute," &c.

It was proved that the letter set out in the indictment was left by the prisoner at a gate in a public road near Sir J. Rowley's house, directed as stated in the indictment, and sealed; and that the letter having been found there by one of the witnesses, it was forwarded by him to Sir J. Rowley's house, and there deposited in the steward's room, and it was there opened by Mr. Hardy the steward, who was authorized by Sir J. Rowley to open and read such letters; but Mr. Hardy, having opened and read the letter, did not deliver it to Sir J. Rowley or to Mr. Brown, who was a tenant of Sir J. Rowley, but handed it over to Stephen English, a constable, who, on the 9th of April following, showed the letter both to Mr. Brown and to Sir J. Rowley. Mr. Brown occupied a house, out-houses, barn, and farming premises belonging to Sir J. Rowley, under an agreement, two years of which remained unexpired; and he held no property under any other landlord, and was possessed of no house, out-houses, barn, or farming premises of his own.

ALDERSON, B., (in summing up.)—With respect to the first count of this indictment, which charges the prisoner with sending a letter to Sir J. Rowley, threatening to burn his, Sir J. Rowley's, property, I think, that as the house, out-houses, and barns in the occupation of Mr. Brown belong in reversion to Sir J. Rowley, the prisoner may be convicted on that count; and, with respect to the second count, you will consider whether the prisoner, in leaving this letter in the manner that has been described, *595] intended that it should not only reach Sir J. Rowley, to *whom it was directed, but that it should also reach Mr. Brown; for if you think that the prisoner did so intend, I am of opinion that that would be a sending of the letter to Mr. Brown, and the prisoner ought to be found guilty on the second count of the indictment. With respect to the third count, which is invalid in point of law, an acquittal may be taken on that.

Verdict—Guilty on the first and second counts of the indictment, and Not guilty on the third count.

ALDERSON, B., sentenced the prisoner to be transported for ten years, but reserved the case for the consideration of the fifteen judges.

Prendergast and *O'Malley*, for the prosecution.

Gurdon, for the prisoner.

Before Lord DENMAN, C. J., TINDAL, C. J., POLLOCK, C. B., PARKE, B., ALDERSON, B., PATTESON, J., GURNEY, B., WILLIAMS, J., COLERIDGE, J., COLTMAN, J., MAULE, J., ROLFE, B., WIGHTMAN, J., CRESSWELL, J., and ERLE, J.

Gurdon, for the prisoner.—I submit, that the prisoner should have been acquitted on the first and second counts of this indictment; but even if the prisoner is entitled to judgment in his favour on the first count only, I should also submit, on the authority of *Mr. O'Connell's case*, that the present sentence cannot be supported.

ALDERSON, B.—Both the first and second counts here *are good on the face of them, and, therefore, there can be no error on the second. [*596]

Gurdon.—With respect to the first count of the indictment, I submit, that a reversionary interest in a house which is threatened to be burnt, is not sufficient to support an allegation that it is the house of the person having that reversionary interest; and that the house stated to be the house of any person, must be taken to mean the house of the person in possession of it. The words of the stat. 4 Geo. 4, c. 54, s. 3, are, “If any person shall knowingly and wilfully send or deliver any letter or writing, with or without any name or signature subscribed thereto, or with a fictitious name or signature,” “threatening to kill or murder any of his majesty’s subjects, or to burn or destroy his or their houses, out-houses, barns, stacks of corn, grain, hay, or straw,” he shall be guilty of felony.

ALDERSON, B.—But for the cases, I should have thought that that would include any letter sent to any of her majesty’s subjects, respecting the property of any of her majesty’s subjects.

Gurdon.—In the case of *Regina v. Burridge*, 2 M. & Rob. 296, two counts of the indictment charged the prisoner with sending a threatening letter to a person named Ley, threatening to burn a house, his property: and two other counts charged the sending the letter to Ley, threatening to burn the house, but stating the house to be in the possession of Elliott, and the property of Ley. Elliott was Ley’s tenant; and it was contended that the first two counts were not proved, as it was Elliott’s house, and not Ley’s, and that the two latter counts did not charge any offence within the statute. Mr. Justice MAULE was of that opinion, and said, that “it must otherwise be admitted, that, if a party should have any interest whatever in a house, such as a reversion *expectant on the determination of a particular estate, however remote or contingent, the house would [*597] be sufficiently described as ‘his.’ As to the other counts, the offence charged was that of sending a letter to A., threatening to burn the house of B., which, according to the case cited [*Rea v. Paddle*, R. & R. C. C. 484] was not within the act.” With respect to both counts of the indictment in the present case, I submit, that there was no sending of the letter either to Sir J. Rowley or to Mr. Brown. The letter never reached either till it had been opened by Mr. Hardy, the steward, and he delivered it to the constable English, and by him it was shown but not delivered to Sir J. Rowley and to Mr. Brown; and there is a great difference between a letter being shown to a person and delivered to him; and, moreover, the constable might have known who wrote the letter.

ALDERSON, B.—Was not the letter sent to Sir J. Rowley, when it was dropped for it to be found and taken to him?

Gurdon.—In the case of *Rex v. Paddle*, R. & R. C. C. 484, a letter, threatening to burn the house of Rodwell and the stacks of Brook, was sent to Kirby, and the indictment charged the sending it to Kirby; and the judges held, that a sending it to Kirby, as Kirby was not threatened, was not within the stat. 27 Geo. 2, c. 15, (for which the provisions of the stat. 4 Geo. 4, c. 54, are substituted;) and they intimated, that, if Kirby had delivered it to Rodwell or Brook, and a jury should think that the prisoner intended he should so deliver it, that would have been a sending it by the prisoner to Rodwell or Brook, and would support a charge to that effect; but it would seem that that meant a delivery of the letter unopened.

*598] PATTESON, J.—In the case of *Rex v. Wagstaffe*, R. & R. C. C. 398, the *party threatened never had the letter at all in his possession, and his wife read it to him.

Gurdon.—In criminal cases, the rule *qui facit per alium facit per se* appears only to apply where a perfectly innocent agent is employed to do the act. Mr. Justice FOSTER (a) lays it down, that where the act is done by a guilty agent, that makes the absent person who employs him an accessory before the fact.

LORD DENMAN, C. J.—If a man said, “I have written a letter, threatening to burn the stacks of another person, will you deliver it?” and you did deliver it, would not that be a sending, though the person carrying the letter knew its contents?

PATTESON, J.—If a man sent a threatening letter by a guilty agent, having read it to him first, could you not indict the one for sending the letter, and the other for delivering it?

ALDERSON, B.—It is no ingredient in this offence, that the name of the writer of the letter should be unknown.

Gurdon.—This letter was open when it reached the constable, and I submit, that he could not complete the offence of the prisoner by taking the letter to Sir J. Rowley or to Mr. Brown.

ALDERSON, B.—The whole act of the prisoner ceased when he left the letter; and if he left the letter with intent that it should go on, that is a sending it; and what the constable did with it afterwards is, I think, quite immaterial.

POLLOCK, C. B.—Putting a letter out of your possession may be a sending it. Dropping it by accident is not a sending it.

*599] PATTESON, J.—The words of the act are not “shall send or deliver a threatening letter to any person,” but “shall send or deliver it.”

Gurdon.—I submit that this is a case of showing a letter, and not of sending or delivering it, and that, if there was a delivery of it to Mr. Brown, that was only by the constable, which could not be a delivery of it within the stat. 4 Geo. 4, c. 54, s. 3.

LORD DENMAN, C. J.—We all think that this case was properly left to the jury on the second count of this indictment, and that the second count was proved. The first count it is not necessary to enter upon. We proceed entirely on the second count.

O'Malley, for the prosecution, was not heard.

The fifteen judges were unanimously of opinion, that the case, on the second count of the indictment, was properly submitted to the jury, and that that count was proved.

(a) Fost. Cr. L. 349.

*HOME CIRCUIT, 1844.

[*600

KENT SUMMER ASSIZES.

(Crown Side.)

BEFORE BARON GURNEY.

REGINA v. GEORGE PLUMMER.

Where husband and wife are separated by common consent, the husband granting the wife a stipulated allowance, which is regularly paid, he is not bound to supply her with shelter; but if he knows, or be informed that she is without shelter, and refuses to provide her with it, in consequence of which her death ensues—*Seemle*, that he is guilty of manslaughter, (even though the wife be labouring under disease which must ultimately prove fatal,) if it can be shown that her death was accelerated for want of the shelter which he had denied.

It is the duty of a coroner before whom an inquisition *super visum corporis* is taken, to read over to every witness examined on such inquest the evidence he has given, and to desire the witness to sign it.

THIS was an indictment for manslaughter.—The first count was as follows:—"The jurors, &c., present, that, before, upon, and during all the several days and times in this count hereinafter mentioned, George Plummer, late of the parish of North Cray, in the county of Kent, labourer, was the husband of one Maria Plummer, she the said Maria Plummer, during all the days and times in this count mentioned, being sick, weak, diseased, distempered, and disordered in her body, and through such weakness, &c., unable to provide herself with such food, raiment, apparel, and shelter as were necessary for the sustenance and protection of her body, and being unable, during all the days and times aforesaid, to provide herself with such medicines, care, and treatment as were necessary for the cure and alleviation of her said sickness, &c.; all which several premises the said George Plummer, on all the days, &c., well knew; and the jurors aforesaid, &c., further present, that it was the duty of the said [*601 George Plummer, being such husband as aforesaid, during all the days and times aforesaid, to find, provide, and supply the said Maria Plummer with competent and sufficient meat and drink for the sustenance of her body, and also with competent and sufficient apparel, lodging, and shelter for the protection of the body of the said Maria Plummer, and also with such medicines, care, and treatment as were necessary for the cure and alleviation of her said sickness, &c.; and the jurors aforesaid, &c., present, that the said George Plummer, on the 19th of November, 1843, and on divers other days and times between that day and the 24th of November, 1843, &c., did assault the said Maria Plummer, and that the said George Plummer, on the said 19th of November, feloniously, and without lawful excuse, and contrary to his duty in that behalf, and against the will of the said Maria Plummer, did omit, neglect, and refuse to find, provide, and supply to the said Maria Plummer competent and sufficient

meat and drink for the sustenance of the body of the said Maria Plummer and also, during all the several days last aforesaid, feloniously, without lawful excuse, contrary to his duty in that behalf, and against the will of the said Maria Plummer, did omit, neglect, and refuse to provide and supply the said Maria Plummer with competent and sufficient apparel, lodging, and shelter for the protection of the body of the said Maria Plummer; and also, during all the days last aforesaid, feloniously, without lawful excuse, contrary to his duty in that behalf, and against the will of the said Maria Plummer, did omit, neglect, and refuse to find, provide, and supply the said Maria Plummer with such medicines, care, and treatment, as were necessary for the cure and alleviation of the said sickness, weakness, &c.; by means of which said several premises, she the said Maria Plummer, on and from the said 19th of November, 1843, until the said 24th of November, in the said year, did languish, and languishing did live, and then, to *602] wit, on the said 24th of November, in the year aforesaid, &c., of the said mortal sickness, weakness, distemper, and disorder of her body, did die. And the jurors, &c., do say, that the said George Plummer, her the said Maria Plummer, in manner and form aforesaid, feloniously did kill and slay," &c. The *second* count was similar to the first, except that it omitted the allegations of assault, and also of the acts having been done against the will of the deceased. The *third* count charged the death to have been caused by the inclemency of the weather; and the *fourth*, *fifth*, and *sixth* counts repeated severally the allegations in the second, relative to the omitting to supply clothing, lodging, food, and medicine.

The prisoner was likewise charged with the same offence on the coroner's inquisition: and it appeared from the evidence, that the prisoner and the deceased were married, and that, for about four years previous to the death of the wife, which event took place on the 24th November, 1843, they had separated by mutual consent, the prisoner allowing her 2s. 6d. a week. This sum had been, in general, regularly paid, and the last payment was on the Sunday preceding her death, namely, the 19th November; from that day the deceased had been ailing. On Tuesday, the 21st November, she was turned out of her lodgings, being at that time suffering from diarrhœa, sickness, and extreme pain. She proceeded to a surgeon, who gave her some medicine. This she took, which somewhat relieved her, and the following day she again visited the surgeon, who gave her some more medicine, together with a note to the relieving officer of the union. This was never delivered. About the middle of that day she was at the house of a person of the name of Weller, in a state of great illness and suffering, when the prisoner, her husband, passed by. Mrs. Weller called him in, telling him he must take his wife away, as she could not shelter there. The prisoner replied, "Turn her out; I won't be pestered with her," and then walked away. On the night of Wednesday, which was wet and dark, she was seen by a police constable, wandering *603] about, seeking shelter at Foot's Cray. The constable took her to a house, where the prisoner, her husband, lodged. On calling him, the prisoner came to the window, when the constable told him of the state of his wife, who was ill and without lodging, and explained to him that it was incumbent on him to provide her with lodging and relief. The prisoner answered, that he had no lodging for her, that she was a nasty beast, and that he could not live with her; and immediately after, he shut the window and went away. The constable would not positively swear, that the prisoner actually saw that his wife was there with him. The deceased

refusing to accompany the constable to the station-house, he left her. At 9 A. M. he subsequently found her sitting down in a privy, the door of which was unbolted, which was at the back of some houses. It was raining hard and blowing a gale of wind, and she had closed the door. She appeared then ill and wet. At 7 P. M., on the following day, Thursday, the deceased came to the Black Horse public-house at Sidarp, being, to all appearance, very ill. The prisoner was, at the moment, in the public-house with some friends, and when told of the state of his wife, said, "she had never been a wife to him for three years; but yet, if the landlady would afford her the accommodation of a bed, he would pay for it." She had already received a bed from the landlady, for which the deceased offered to pay her, and she went to bed. On the next morning (Friday) the deceased was found to be in a dying state. She expired before medical aid could be procured. It appeared, from the post-mortem examination which had been made, that the deceased was labouring under a complication of mortal diseases, which must have speedily resulted in death. The surgeon who opened the body gave it as his opinion, that the immediate cause of death was diarrhœa brought on by exposure to the inclemency of the weather; and that he considered the period of her existence had been abridged in consequence of her not having had shelter on the Wednesday night.

*In the progress of the trial, Mr. Carter, the coroner, was called to prove the deposition of one Hisman, who had died since he had been examined on the inquest. The deposition consisted of what Hisman said in the presence of the prisoner, but it was not signed by Hisman, neither had the deposition been read over to him. Mr. Carter stated, this was according to his uniform practice.

GURNEY, B.—Then, pray, Mr. Carter, let me advise you not to follow this practice in future. It is a part of your duty, and you are bound by law to read the evidence over to the party, and then to procure the signature. Supposing you were dead, who is to prove these notes? By this irregular proceeding you may deprive the Crown of most important evidence, and unintentionally be the cause of defeating justice.

Mr. Carter, the coroner, then stated, that, in the course of twelve years' experience, he had not considered it his duty or did not think himself bound to adopt this course, but submitted to his lordship, that a coroner's notes were like the notes of a judge at a trial.

GURNEY, B.—I think you are bound to take the evidence in the manner I have already stated to you. The depositions are then *evidence*, but a judge's notes are not *evidence*.

In his defence, the prisoner stated to the jury the causes which led him to separate from the deceased, and said, that, in a conversation which he had with Mr. Wells on the Wednesday, he offered to pay for whatever relief the parish might afford to his wife. He further added, that, when the constable called him up on the Wednesday night, his landlord would not allow him to admit the deceased, but that he then promised to procure her a lodging on the next day.

GURNEY, B., (to the jury).—The prisoner stands indicted for manslaughter. But this manslaughter wears a very *different aspect from those which ordinarily come under our notice. In the great majority of cases, the manslaughter, indeed, I may say in almost all such cases, the death, is the result of some violent act done or committed. Here, however, the charge is, that the prisoner, being the husband of the deceased, did wilfully neglect to pro-

vide her with proper shelter, by reason of which her death was accelerated. There are other counts charging him with neglecting to provide her with food, but no evidence has been adduced in support of them. But whether the death of the deceased was actually caused by the act of the prisoner, or was only accelerated by it, the effect is the same in point of law. If, notwithstanding the nature and extent of her complaints, she could have lived on till the next month or the next week, and her death prematurely occurred on the morning of Friday, the 24th November, owing to, or by the misconduct of, the prisoner, as laid in the indictment, then he is amenable to the law for such misconduct. It appears that the prisoner and his deceased wife had been separated for a considerable time, and that he had agreed to allow her 2s. 6d. a week. Though it does not distinctly appear that this sum was paid punctually every week, still it does appear, that, on the Sunday preceding her death, the deceased had received the stipulated sum. There is, therefore, presumably, no ground for any charge against the prisoner, as having caused her death from want of food, as the half-crown would have supplied her from the Sunday till the Friday. The charge against the prisoner appears to be, that he refused intentionally to provide her with shelter against the inclemency of the weather, she being at the same period of time in a state of disease progressively advancing, then very advanced indeed, and which, no doubt, would soon have ended her sufferings. For the four days preceding her death there is evidence of her state. [The learned Baron here read over his notes of the evidence.]

*606] On the night of Wednesday, *when the deceased was in the privy, the door was closed. The deceased was, therefore, in so far sheltered from the weather, and she requested the constable not to take her to the station-house, which is a remarkable fact, for there she would have found both shelter and warmth. The facts that particularly affect the prisoner in this case are, first, the request made to him by Mrs. Weller on the Wednesday, when she asked him to take care of his wife, which he refused to do. This refusal was about mid-day on Wednesday, and you have heard stated in evidence the state in which the deceased woman then was. On the Wednesday evening in November, on a cold and rainy night, the constable knocks at the window of the prisoner's house, and states that his wife applies to him for shelter, but he shuts the window and refuses it. Such are the facts of the case. You will consider that he had regularly paid her allowance to her, and that he might have been compelled to pay her a larger sum if that had not been sufficient. Under ordinary circumstances he might have refused to have any thing to do with her, but when she was ill, and without shelter, on a cold and wet night in November, the question assumes a different aspect; and it is this, whether you can certainly conclude that his refusal to give her shelter at that time had the effect of causing her death to occur sooner than the event would have happened in the ordinary progress of disease,—sooner, in a word, than if such refusal had not been given. That is really the question for your consideration. Many cases have been decided on the precise extent to which a father, husband, or master is bound to provide for his child, wife, or servant. But in those cases the parties were living under the roof of the parent, husband, or master, which implied a particular obligation. But here the circumstances are different, for the parties were actually separated. Whether this circumstance should take the case out of the ordinary rule, is a point which, if necessary, I will reserve for *further consideration.

*607] But I will now take the opinion of you, gentlemen of the jury, as

to whether the prisoner did, on the night of Wednesday, refuse to give his wife shelter, and whether his so refusing to do so, and leaving her in the state of bodily disease in which she then was, exposed to the inclemency of the weather, accelerated her death. It does not appear in evidence that he knew what her disease was, or that she was afflicted with that mortal illness under which she laboured, or that she was suffering from the diarrhoea which caused her death; but he was, nevertheless, informed that she was very ill, and had not shelter. If you should be of opinion that her death was caused or accelerated by his conduct in refusing to give her shelter, you will say that he is guilty. If, on the contrary, you entertain any doubt on this point, you will acquit him. Various cases have occurred, and will, no doubt, occur again, in which, though juries may highly disapprove of, and reprobate the conduct of parties, yet in which, nevertheless, they cannot, with safe consciences, convict them on a criminal charge.

Verdict—Not guilty.

Bodkin, for the prosecution.

*COURT OF EXCHEQUER.

[*608

Second Sitting in Michaelmas Term, 1844.

BEFORE LORD CHIEF BARON POLLOCK.

HOGARTH v. PENNY and Another.

In replevin, the defendant avowed the taking as a distress for an annuity. The plaintiff pleaded, that no memorial of the annuity was enrolled. Replication, that a memorial of the date of the indenture and of the names of the parties and witnesses, and of the parties by whom the annuity was to be beneficially received, and of the consideration, [setting out the memorial,] was enrolled. Rejoinder, that the memorial did not truly state the names of the persons by whom the annuity was to be received, and the considerations, but was untrue in this, that J. B. was not the only person by whom the annuity was to be beneficially received, [denying separately the statements of the memorial.] Rejoinder, that the memorial did truly state the names of the persons by whom the annuity was to be beneficially received, and the considerations:—*Held*, that, on these pleadings, the defendant must begin.

REPLEVIN.—The declaration was in the usual form. The first avowry avowed the taking as a distress in respect of an annuity of £100, granted by an indenture, dated the 19th day of April, 1830, to Francis Kemble and Frederick Lock, as trustees, and assigned by F. Lock and Henley Smith (appointed for the purpose by the Court of Chancery, in the place of F. Kemble) to, and now vested in the defendants. There were five other exactly similar avowries, in respect of five other annuities, granted by the same indenture.

Pleas to the first avowry,—First, *non est factum*, as to the indenture of the 19th of April, 1830. Second, that F. Lock did not assign the annuity, *modo et formâ*. Third, that F. Kemble was not a trustee of the annuity, *modo et formâ*. Fourth, that Henley Smith did not assign the annuity, *modo et formâ*; and, fifth, after craving oyer of the indenture, (which was

set out on the record,) that the several annuities were granted for a pecuniary consideration, *and that no memorial thereof was enrolled *609] within thirty days, according to the statute, (concluding with a verification.) There were five similar pleas to each of other five avowries; and to the fourth avowry, there was an additional plea of riens in arrear.

Replication, taking issue on all the pleas, except the fifth plea, and the other pleas similar to that, which denied the memorial; and, as to the fifth plea, that a memorial of the date of the indenture, and of the names of the parties and witnesses, and of the persons for whose lives the annuities were granted, and of the persons by whom the same were to be beneficially received, and of the pecuniary considerations for granting the same, and of the annual sums to be paid, was, within thirty days after the execution of the indenture, to wit, on the 19th day of May, 1840, duly enrolled in the Court of Chancery, according to the statute, which said memorial was and is as follows: [setting it out,] as by the said memorial, duly enrolled, fully appears, (concluding with a verification by the record.) There were five similar replications to the other pleas, which denied the memorial.

Rejoinder to the replication to the fifth and other pleas, which denied the memorial, that the memorial enrolled in the Court of Chancery "did not, nor does truly state the names of the person and persons by whom the said annuities or yearly sums were to be beneficially received, and the pecuniary considerations for granting the same; but, on the contrary, the said memorial, so far as the same relates to the said annuity of £100, was and is false and untrue in this, to wit, that the said James Brown, in the said memorial mentioned, was not, nor is the only person by whom the said last-mentioned annuity was to be beneficially received; nor was the sum of £1000, in the said memorial in that behalf mentioned, the consideration for the grant of the said last-mentioned annuity, nor was the consideration of such grant paid in a note of the Governor and Company of the Bank of England, [denying, in like manner, a considerable number of *610] the other statements *contained in the memorial, as to the considerations of the annuities, and by whom they were to be beneficially received;] and so the plaintiff again says, that there never was any such memorial, as by the said act of Parliament is required, enrolled in the said High Court of Chancery, according to the directions of the said act of Parliament," (concluding with a verification.)

Sur-rejoinder, "That the said memorial so as aforesaid enrolled in the High Court of Chancery did, and does truly state the name and names of the person and persons by whom the said annuities and yearly sums, and every of them, were, and are to be beneficially received, and the pecuniary consideration and considerations for granting the said annuities, and every of them," (concluding to the country.)

Peacock, for the plaintiff, having opened the pleadings.

Kelly, for the defendants, submitted that the plaintiff must begin.

Jervis, for the plaintiff.—This is an action of replevin: both parties are actors, and the affirmative of proof here lies on the defendants.

Kelly, for the defendants.—The burden of proof of the allegations, "nor was the sum of £1000 the consideration, nor was it paid in a note of the Bank of England," certainly lies on the plaintiff.

POLLOCK, C. B.—The defendants say there was a memorial, and set it out, averring that it truly states the considerations of the annuities. The

rejoinder does nothing more than traverse that, and then the defendants re-affirm it, and I think they are bound to prove it.

Kelly, for the defendants, opened his case, and there was a verdict for the defendants, with leave to move to enter a *verdict for the plain- [611
tiff, on grounds not at all affecting the right to begin.

Jervis, W. H. Watson, and Peacock, for the plaintiff.

Kelly, E. V. Williams, and Couch, for the defendants.

BIRT v. LEIGH.

In debt, the declaration was for £40 for goods sold, and for £40 on an account stated; the particulars of demand were for a balance of 29l. 10s., but in the particulars no credits were given or dates specified. The defendant pleaded a general plea of payment to the whole declaration:—*Held*, that, under these circumstances, the defendant must begin.

A receipt for 2l. 2s. “being the balance of account up to this day, for houses in W.-road,” requires a 10s. stamp.

DEBT.—The declaration stated that the defendant was indebted to the plaintiff in £40 for work and labour, and £40 on an account stated.—Plea, a general plea of payment to the whole declaration.

The plaintiff’s particulars of demand, annexed to the *Nisi Prius* record, were for a balance of 29l. 10s., giving credits, and specifying no dates.

Knowles, for the plaintiff.—I submit that in this case the plaintiff is entitled to begin. From the state of the record and particulars, it is incumbent on the plaintiff to prove the whole that was due to him; or, at all events, for what particular work he brings his action, inasmuch as, without that, it will be impossible for the defendant to ascertain what amount of payment he is bound to prove. Suppose the defendant to begin and to prove payments to a greater amount than the balance claimed by the particulars, still the plaintiff must go on and prove work done beyond that sum, just as if a plea of *nunquam indebitatus* had been put upon the record.

POLLOCK, C. B.—I think that in this case the defendant must begin. Whatever inconvenience may result from this course, it is only the necessary consequence of adhering to a plain rule of law, which is, that the party upon whom *the affirmative proof lies should begin, and lay [612
that proof before the jury. In the present case, I have no doubt that the defendant must begin, for it is quite clear, that, if no evidence were now offered on either side, the plaintiff would be entitled to take a verdict for the full amount of his demand.

Crowder, for the defendant, opened the defendant’s case.

On the part of the defendant, a receipt was offered in evidence in support of the plea of payment; it was unstamped, and was as follows:—
“1843, July 8th. Received of Mr. G. Leigh, the sum of 2l. 2s. Od., being the balance account up to this day, for houses in Wellington-road.

(Signed)

“WM. BIRT.”

Knowles, for the plaintiff.—I submit that this receipt cannot be received in evidence, as it is unstamped. It ought to bear a 10s. stamp, as being a “general acknowledgment” of a debt having been paid “whereof the amount” is not “therein specified,” within the Stamp Act, 55 Geo. 3, c 184, sch., part 1.(a)

(a) By the Stamp Act, 55 Geo. 3, c. 184, sch., part 1, it is enacted, that “any receipt or discharge, note, memorandum, or writing, whatever, given to any person for or upon

*613] **Crowder and Rawlinson*, for the defendant, cited the case of *Dibdin v. Morris*, 2 C. & P. 44,(a) and contended that this receipt did not fall within either the letter or the spirit of the provision of the Stamp Act, which was relied upon on the other side.

POLLOCK, C. B.—I am of opinion that this receipt does not require any stamp, and I shall receive it in evidence.

The receipt was given in evidence. Verdict for the defendant.(b)

Knowles and Atherton, for the plaintiff.

Crowder and Rawlinson, for the defendant.

the payment of money, which shall contain, import, or signify any *general* acknowledgment of any debt, account, claim, or demand, debts, accounts, claims, or demands, *whereof the amount shall not be therein specified*, having been paid, settled, balanced, or otherwise discharged or satisfied, or whereby any sum of money therein mentioned shall be acknowledged to be received *in full*, or in discharge or satisfaction of any such debt, account, claim, or demand, debts, accounts, claims, or demands, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be a receipt for the sum of £1000 or upwards, within the intent and meaning of this schedule, and shall be charged with the duty of ten shillings accordingly. But by the preceding paragraph of the same enactment, it is also enacted, that, "any note, memorandum, or writing whatsoever, given to any person for or upon the payment of money, whereby any sum of money, debt, or demand, or any part of any debt or demand *therein specified*, and amounting to £2 or upwards, shall be expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, or which shall import or signify any such acknowledgment, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be a receipt for a sum of money of equal amount with the sum, debt, or demand so expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, within the intent and meaning of this schedule, and shall be charged with a duty accordingly."

(a) In that case it was held, that a receipt given by the stage-manager of a theatre for 52*l.* 10*s.*, "being the amount of a benefit at the Haymarket Theatre, which sum, together with £100 already received, is in satisfaction of all my claims for the last season," required only to be stamped as a receipt for 52*l.* 10*s.*, and not as a receipt in full, or as a receipt for 152*l.* 10*s.*

(b) In Hilary Term, 1845, a rule to show cause why there should not be a new trial was obtained, which, after argument, was made absolute, the Court of Exchequer being of opinion that the receipt for "the sum of 2*l.* 2*s.*, being the balance of account up to this day for houses in the Wellington-road," required a 10*s.* stamp.

Sitting in London in Michaelmas Term, 1844.

BEFORE BARON ALDERSON.

PRIDMORE v. HARRISON.

A person who pays money to another, who is authorized to receive it by a power of attorney, is not entitled to keep possession of the power of attorney.

ASSAULT.—The declaration stated, that, on the 24th of August, 1844, the defendant assaulted the plaintiff.—Pleas—First, not guilty; second, that the defendant was possessed of a certain document, to wit, a power of attorney, and the plaintiff, just before the time when, &c., had wrongfully seized and laid hold of it, and was about to take it away; where-
*614] upon the defendant requested the *plaintiff to return it to him the defendant, which the plaintiff refused to do, when, in order to retake and obtain possession of the said document, the defendant gently laid hold of the plaintiff, &c. Third, a similar plea; but stating that

John Webb Robinson was possessed of a certain document, to wit, a power of attorney, and that the defendant acted as his servant, and by his command.

Replication de injuriâ.

It appeared from the evidence of a witness named Cooke, that there had been an arbitration between two other persons, named Brobin and Robinson, and that the defendant was the agent of the latter, and that the witness acted for the former; and that, the arbitrators having awarded in favour of Mr. Brobin, the witness and the plaintiff, who was a clerk of Mr. Ashley, the attorney, on the 24th of August, 1844, went to the defendant's counting-house, and, on Mr. Robinson, who was there, saying that he would not pay the amount awarded without seeing a power of attorney from Mr. Brobin, the plaintiff showed to the defendant a power of attorney which had been prepared by Mr. Ashley, by which power of attorney Mr. Brobin authorized the witness to receive the amount awarded.

ALDERSON, B.—This power of attorney was brought by the plaintiff and the witness, for them to receive the money from Mr. Robinson, or from his agent the defendant. It was the power of attorney of the witness.

It was further proved that the defendant read the power of attorney, and laid it on a desk; and as soon as the amount awarded had been paid, the plaintiff said that he should hold the power of attorney till Mr. Ashley's bill was paid, and took it up from the desk, and was going to take it away, when the defendant tried to get hold of it, and in so doing pushed the plaintiff's head through the glass door of a book-case.

Humphrey, for the defendant, addressed the jury in *mitigation [^{*615} of damages. He admitted that the power of attorney did not belong either to the defendant or to Mr. Robinson, and that they were neither of them entitled to keep possession of it, though the defendant had acted under the *bonâ fide* belief that they were so entitled, from the practice at the Bank and the East India House being always to retain powers of attorney relating to stock.(a)

Verdict for the plaintiff.—Damages, £5.

Jervis and *R. Gurney*, for the plaintiff.

Humphrey and *Butt*, for the defendant.

(a) Mr. Dixon, in his treatise on the Law of Title-Deeds, (Vol. 2, p. 533,) says, with reference to leases executed under a power of attorney, "In the conclusion of such lease it is proper to say, in witness whereof A. B., of such a place, &c., in pursuance of a letter of attorney hereunto annexed, bearing date such a day; or, if the letter of attorney be general, and concerns more lands than are comprised in the present lease, then, in pursuance of a letter of attorney bearing date such a day, &c., a true copy whereof is hereunto annexed, hath put the hand and seal of the principal, and to write the principal's name, and deliver it as the act and deed of the principal." And for this he cites 2 Bart. Elem. of Con. 582, n. 1. Mr. Bythewood (2 Byth. Con., 2d ed., 661) says, that a purchaser cannot be compelled to accept a conveyance under a power of attorney. And it is also laid down by Sir E. Sugden, (Vend. and Purch., Vol. 2, ch. 13, s. 1, No. 15,) that, "as a purchaser cannot be required to take a conveyance executed by attorney, so, on the other hand, if a vendor only covenant to surrender or convey lands to a purchaser upon request, he is not compelled to appoint an attorney for that purpose."

*616]

*COURT OF COMMON PLEAS.

Middlesex Sitings after Trinity Term, 1844.

BEFORE LORD CHIEF JUSTICE TINDAL.

NEWTON v. ROWE and Another.

In an action for a libel, charging the plaintiff with a false and malicious prosecution, in which the defendants pleaded that the statements in the alleged libel are true, evidence is not receivable of statements made by witnesses examined before the magistrates on behalf of the prosecution, in order to show *quo animo* the prosecution was conducted.

CASE for a libel(a) upon the plaintiff, a barrister, by the proprietors of the Cheltenham Examiner.—The defendants pleaded a justification, alleging that all the statements in the supposed libel were true.

It appeared that an article was published in the Cheltenham Examiner of the 14th of December, 1843, charging Mr. Newton with having falsely and maliciously accused his mother-in-law, Lady Ricketts, and four other persons, of forging, or conspiring to forge the will of the late Sir T. R. Ricketts.

Kelly, for the defendants, having examined in chief a witness who was present during the inquiry before the magistrates, at Cheltenham, into the charge preferred by Mr. Newton against Lady Ricketts,

Cockburn, for the plaintiff, proposed to ask the witness, on his cross-
*617] examination, what was said by other witnesses *who had been examined, on the part of the prosecution, at the inquiry.

Kelly objected to the question.

Cockburn.—The question is, whether Mr. Newton instituted and carried on these proceedings without reasonable or probable cause; and the evidence is material to show the state of his mind when he was before the magistrates. It is like an action for a malicious prosecution, where what has been said by the prosecutor is part of the plaintiff's case.

M. Chambers and *Petersdorff* were heard on the same side.

Kelly, *contra*.—If the question in this case were, whether a speech by counsel was justified by the evidence, there would be no doubt that the court must hear what the evidence was; but here the question is, whether the plaintiff had reasonable and probable cause for instituting these proceedings—not what the proceedings were, nor what was said during their progress.

Cockburn replied.

TINDAL, C. J.—It appears to me, that the evidence, in this stage of the proceedings, is not admissible. You have a right, in an action for a malicious prosecution, to have the story which the prosecutor has himself given,

(a) The declaration contained four counts upon four different libels; that upon which the point reported arose was the second count.

from the necessity of the case ; but no such necessity exists here. You can call the witnesses who were examined before the magistrates at Cheltenham ; but you wish to give in evidence what they then said, without subjecting them to cross-examination. There is this additional difficulty in the way—the gravamen of the charge against the plaintiff is, that there was a false and malicious prosecution from the beginning. I, [*618 therefore, think I ought not to admit the evidence.

Verdict for the plaintiff on the first and third, and for the defendants on the second and fourth counts.(a)

Cockburn, M. Chambers, and Petersdorff, for the plaintiff.

Kelly, W. J. Alexander, and Greaves, for the defendants.

(a) See ante, note (a).

BEFORE JUSTICE CRESSWELL.

ROWE and Another v. POLKINGHORNE.

In an action for goods sold and delivered upon the credit of the defendant, a question as to the amount of the defendant's income cannot be put, if the evidence be tendered with a view to show the improbability of authority having been given to purchase the goods. Where, however, an action was brought against a widow for dresses ordered and worn by her daughter, who was about to be married—*Held*, that evidence of the amount of the defendant's income was admissible, as tending to show that the dresses were not supplied upon her credit, but upon the credit of her daughter's future husband.

ACTION on a milliner's bill, for goods sold and delivered. The defendant was the widow of an officer in the navy, and the goods principally consisted of dresses ordered and worn by the defendant's daughters, the eldest of whom was about to be married at the time when they were supplied.

Byles, Serjt., for the defendant, proposed to ask one of the witnesses, what was the amount of the defendant's income.

Bramwell objected to the question being put.

*CRESSWELL, J.—Upon what grounds do you tender the evidence, [*619 brother *Byles*?

Byles, Serjt.—The evidence is material, to show the improbability of Mrs. Polkinghorne's giving authority to purchase the articles of dress enumerated in the bill.

CRESSWELL, J.—Upon that ground I think it is not admissible.

Byles, Serjt.—I do not wish to confine myself to that ground, although I have not any other reason to suggest for the reception of the evidence. As counsel for the defendant, I tender the evidence for any and every purpose for which it is admissible in law.

CRESSWELL, J.—Then, I think, I must admit the evidence ; because, if I exclude it, it may be said, that the dresses ordered and worn by the defendant's eldest daughter, now Mrs. Murray, were supplied on the credit of her future husband, and not on the credit of her mother.

The question was then put, and it appeared that the defendant had an

allowance of £90 a year, as the widow of a naval officer, besides £300 a year of her own, and the house in which she resided.

Verdict for plaintiffs, 42*l.* 1*s.*

Bramwell, for the plaintiffs.

Byles, Serjt., for the defendant.

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*PROMOTIONS.

IN the Vacation after Trinity Term, 1844, *J. H. Hodgson*, Esq., *C. H. Whitehurst*, Esq., *W. J. Alexander*, Esq., *R. C. Hildyard*, Esq., and *James Parker*, Esq., were appointed her Majesty's Counsel learned in the Law.

In the same vacation, *E. Bellasis*, Esq., *J. A. Kinglake*, Esq., and *C. Chadwicke Jones*, Esq., were called to the degree of Serjeant-at-Law.

In Michaelmas Term, 1844, *W. Erle*, Esq., was appointed a Judge of the Court of Common Pleas, *vice* Mr. Justice *Erskine*, resigned.

*621]

*OXFORD SPRING CIRCUIT, 1845.

BEFORE LORD CHIEF BARON POLLOCK AND BARON PLATT.

READING ASSIZES,

BEFORE LORD CHIEF BARON POLLOCK.

REGINA v. JONATHAN AUSTIN.

On the trial of an indictment on the stat. 9 Geo. 4, c. 69, s. 9, for night poaching, it appeared that the offence was committed on the 12th of January, 1844. The indictment was preferred on the 1st of March, 1845. The warrant of commitment by which the defendant was committed to take his trial for this offence was given in evidence: it was dated on the 11th of December, 1844:—*Held*, that it was sufficiently shown that the prosecution was commenced "within twelve calendar months after the commission" of the offence, within the 4th section of that statute.

NIGHT poaching.—The indictment, which was on the stat. 9 Geo. 4, c. 69, s. 9, charged that the defendant, with two other persons, on the 12th of January, 1844, entered enclosed land of Ebenezer Fuller Maitland by night, armed, with intent to destroy game there.

It appeared that the offence had been committed on the 12th of January, 1844, and that the present indictment had been found at the Berkshire Assizes, held on the 1st of March, 1845. It appeared by the warrant of commitment on which the defendant was committed for trial on the present charge, and which was given in evidence, that the defendant was committed for trial on this charge on the 11th of December, 1844.

*622] *J. Jeffreys Williams*, for the defendant.—By the stat. *9 Geo. 4, c. 69, s. 4, it is enacted, that "the prosecution for every offence

punishable upon indictment, or otherwise than upon summary conviction, by virtue of this act shall be commenced *within twelve calendar months* after the commission of such offence." I submit that this prosecution must fail, it being commenced more than twelve calendar months after the commission of the offence; the commencement of the present prosecution being the preferring of the indictment before the grand jury in March, 1845. The information before the magistrates is not necessarily the commencement of any proceeding.

Bros, for the prosecution.—I submit, that the information before the committing magistrate is to be considered as the commencement of the prosecution. In the case of *Rex v. Wallace*, 1 East, P. C. 186, which was an indictment on the stat. 8 & 9 Will. 3, c. 26, s. 9, (now repealed,) for high treason, "in *colouring* a piece of base coin resembling a shilling with materials producing the colour of silver," and it being essential that the prosecution should be commenced within three months after the offence, it was held that the information and proceedings before the magistrate were the commencement of the prosecution, and not the preferring of the indictment; and there, although the warrant of commitment stated that the prisoner was charged "with suspicion of high treason in counterfeiting the current money of the kingdom, viz. shillings," the judges held, that the variance between the manner of laying the offence in the indictment and charging it in the commitment made no difference. In the case of *Rex v. Phillips*, R. & R. C. C. 369, proof by *parol* that the prisoner was apprehended for treason respecting the coin within three months after the offence was committed was held not to be sufficient where the indictment was preferred after the three months; but, in that case, neither the warrant to apprehend, nor the warrant to commit, nor the depositions taken before the magistrate, were produced. In this case, the warrant of commitment is produced. [*623]

POLLOCK, C. B.—I think that the warrant of commitment must be taken in this case to show the commencement of the prosecution. The first proceeding was to take the party before the magistrate, and he grants his warrant of commitment. I think that this prosecution is shown to have been commenced within twelve months after the commission of the offence.

J. Jeffreys Williams addressed the jury for the defendant, and contended that the evidence adduced to show that the defendant was one of the persons who was on Mr. Maitland's land on the night in question was not sufficient.

Verdict—Not guilty.

Bros and *Maitland*, for the prosecution.

J. Jeffreys Williams, for the defendant.

BEFORE BARON PLATT.

REGINA v. ANN COXHEAD.

An indictment on the stat. 9 Geo. 4, c. 31, s. 14, for endeavouring to conceal the birth of a dead child, need not state whether the child died before, at, or after its birth.

An indictment for that offence which charges that the defendant did cast and throw the dead body of the child into the soil in a certain privy, "and did *thereby* then and there unlawfully dispose of the dead body of the said child, and endeavour to conceal the birth thereof," sufficiently charges the endeavour to conceal the birth, as the word "thereby" applies to the endeavour as well as to the disposing of the dead body.

If, on the trial of such an indictment, it appear that the body of the child was found lying on the soil, immediately under the seat of a privy, it is a question for the jury, whether it was thrown there for the purpose of concealment, or whether it came from the mother unawares when she was there for another purpose; but the judge on such evidence will not stop the case.

CONCEALMENT of birth.—The indictment was in the following form:—

*624] “The jurors, &c., present, that Ann Coxhead, late of, &c., on, &c., at, &c., being big with a certain female child, afterwards, to wit, on the same day and in the year aforesaid, in the parish aforesaid, in the county aforesaid, of the said child was delivered. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Ann Coxhead, afterwards, to wit, on the same day and in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, with both her hands unlawfully did cast and throw the dead body of the said child into and amongst the soil, waters, and filth then being in a certain privy there, and did thereby then and there unlawfully dispose of the dead body of the said child, and endeavour to conceal the birth thereof, against the form of the statute in such case made and provided, and against the peace of our said lady the queen, her crown and dignity.”

J. Jeffreys Williams, for the prisoner.—I submit, that this indictment is bad, as it does not state whether the child died before its birth, at its birth, or after its birth. It is also insufficient in not stating how the prisoner endeavoured to conceal the birth of the child. It states that she threw the body of the child among the soil, “and did *thereby* unlawfully *dispose* of the dead body of the said child, *and endeavour* to conceal the birth thereof,” without stating how she endeavoured to conceal the birth.

Carrington, for the prosecution.—By the stat. 9 Geo. 4, c. 31, s. 13, it is enacted, that “it shall not be necessary to prove whether the child died before, at, or after its birth,” and the proof being thus rendered unnecessary, it can be of no use to allege it, as it would be a mere superfluous allegation. With respect to the other point, the words of the indictment import, that, by the throwing of the body into the soil, the prisoner endeavoured to conceal the birth, the word “thereby” applying equally to the “endeavour” and to the disposing of the dead body.

*625] *PLATT, B.*—I think the indictment is sufficient.

It appeared from the evidence that the dead body of the child was found in the privy lying on the top of the soil, just as it would if it had dropped from a person who had gone thither for another purpose.

J. Jeffreys Williams asked the learned baron to direct an acquittal, and cited the case of *Regina v. Turner*, 8 C. & P. 755.

PLATT, B.—I must leave it to the jury to say whether the prisoner threw the child into this place, or whether it came from her unawares, when she was there for another purpose.

J. Jeffreys Williams addressed the jury for the prisoner.

PLATT, B. (in summing up.)—If you are satisfied by the evidence that the prisoner threw the dead body of the child into this place, and thereby endeavoured to conceal its birth, you should find her guilty; but if you think that the child passed from her unawares, she being there for another purpose, you ought to acquit her.

Verdict—Not guilty.

Carrington, for the prosecution.

J. Jeffreys Williams, for the prisoner.

*BEFORE LORD CHIEF BARON POLLOCK.

[*626]

WATSON v. MOORE, Clerk.

It was proposed on the part of a plaintiff to give in evidence a letter written by the defendant's attorney, which purported to be an answer to a letter written to him by the plaintiff's attorneys:—*Held*, that, if the plaintiff's counsel put in this letter of the defendant's attorney, he should also call for and put in the letter to which it was an answer, and not leave it to the defendant to put in the letter of the plaintiff's attorneys as his evidence.

FALSE imprisonment.—The first count of the declaration was for the false imprisonment of the plaintiff. Second count for taking boxes and wearing apparel of the plaintiff. Plea, not guilty.

It appeared that the plaintiff, Mrs. Watson, had been the housekeeper of the defendant, the Hon. and Rev. Canon Moore, and that he, on Sunday the 11th of August, 1844, had, without any warrant, caused the plaintiff to be taken into custody and detained three hours and a half, and her boxes searched by a constable, on a charge that she had obtained money by false pretences from a person named Hissey in the name of the defendant. (a) The charge appeared to have been unfounded.

On the part of the plaintiff, it was proposed to put in a letter written by Mr. W. Hulbert, the defendant's attorney, to Messrs. Frankum & Bartlett, the plaintiff's attorneys.

Mr. Ede, the associate, read the commencement of the letter, which was as follows:—"The constable of West Ilsley has just brought me your letter to him of yesterday's date. I beg to inform you"—

*POLLOCK, C. B.—This letter is manifestly an answer to a letter from Messrs. Frankum & Bartlett. If you give this letter of Mr. Hulbert in evidence, you ought also to put in the letter to which it is an answer. [*627]

Carrington, for the plaintiff.—I propose to put in this letter of Mr. Hulbert, as coming from the attorney for the defendant. If the other side wish to put in any other part of the correspondence, they can put it in as their evidence.

POLLOCK, C. B.—If you do not like to put in the letter of Messrs. Frankum and Bartlett to which this is an answer, you should not give this letter in evidence; you should either put in both the letters, or neither.

Carrington, for the plaintiff, called for the letter of Messrs. Frankum & Bartlett, (notice to produce it having been given;) and the letter being produced, both that and Mr. Hulbert's letter in answer to it were given in evidence. Verdict for the plaintiff, damages £75.

Godson and Carrington, for the plaintiff.

Keating, for the defendant.

(a) In the case of *Fox v. Gault*, 3 B. & Ad. 798, it was held, that suspicion that a party has, on a former occasion, committed a *misdemeanor*, is not a justification for giving him in charge to a constable without a justice's warrant; and there is no distinction in this respect between one kind of misdemeanor and another, as breach of the peace and false pretences.

*628]

*OXFORD ASSIZES.

(Crown Side.)

BEFORE LORD CHIEF BARON POLLOCK.

REGINA v. ANN GARDNER.

Mr. R., an officer in the post-office in London, intending to try the honesty of A. G., the post-mistress of Eustone, went to Oxford, and having put marked money into a letter, directed "Tomas Hicks, Radford Lane, Exeter," placed this letter in a bundle of letters in the Oxford post-office, which was to go to the Eustone post-office. This letter going in the bundle of letters to the Eustone post-office, A. G. took out the marked money and denied any knowledge of the letter. Mr. R. neither knew any person named Tomas Hicks, nor that there was any such place as Radford Lane in Exeter:—*Held*, that this was not a stealing of a "post-letter" within the stat. 1 Vict. c. 36, but that the taking of the money by A. G. was a larceny.

In a prosecution by the post-office for a felony, it being stated by the counsel for the prosecution that he appeared as representative of the attorney-general,—*Held*, that, on the ground of his representing the attorney-general, he was entitled to reply without reference to the prisoner's having called witnesses, or not.

THE first count of the indictment charged, that, "before and at the time of the committing of the several offences in the first three counts of this indictment mentioned, the prisoner was employed under the post-office of the United Kingdom of Great Britain and Ireland, to wit, at," &c., and being so employed as aforesaid, and whilst so employed, to wit, on, &c., at, &c., "feloniously did steal, take, and carry away a certain post-letter, to wit, a post-letter directed and addressed as follows, that is to say:—

‘Tomas Hicks,

‘To be left at the Checkers,

‘Radford Lane, Exeter,

‘England.’

‘With speed.’

And which said post-letter so feloniously stolen, taken, and carried away as aforesaid did then and there contain therein certain moneys, to wit, two half-sovereigns, the property of her majesty's postmaster-general, against the form of the statute," &c. The *second* count was in a similar form to the first, except that it charged that the prisoner "feloniously did embezzle a certain other post-letter," containing two half-sovereigns, *629] instead of charging that she stole it. The *third* count was similar to the second, except that it charged that the prisoner "feloniously did secrete a certain other post-letter," instead of charging the embezzling of it. The *fourth* count charged that the prisoner "feloniously did steal, take, and carry away, from and out of a certain other post-letter, certain moneys, to wit, two pieces of the current gold coin of the realm called half-sovereigns, then and there sent by the post, of the moneys of her majesty's postmaster general, against the form of the statute," &c. The *fifth* count was for a larceny in stealing "one letter of the value of one penny, and two pieces of the current gold coin of this realm called half-sovereigns, of the property, goods, chattels, and moneys of the Right Honourable William Earl of Lonsdale, her majesty's postmaster-general." The *sixth* count was exactly similar to the fifth, but laid the property in John Ramsay, instead of in the Earl of Lonsdale.

It was opened, by *Whateley*, for the prosecution, that the prisoner had

been for many years the postmistress of Eustone, and that, in consequence of some suspicions, Mr. Ramsay, the superintendent of the missing letter department in the general post-office, went to Oxford, and, in order to try the honesty of the prisoner, he, on the 5th of November, 1844, marked two half-sovereigns, and put them into a letter, addressed "Tomas Hicks, to be left at the Checkers, Radford Lane, Exeter, England. With speed." Mr. Ramsay knew no such person as Tomas Hicks, and, as far as he was aware, there were no such place in Exeter as the Checkers or Radford Lane. This letter he sealed, and at the Oxford post-office he placed it in a bundle of letters that were to go to Eustone that evening. On this letter reaching the Eustone post-office, it would have been the duty of the prisoner, as Eustone was not on the way from Oxford to Exeter, to have marked it "mis-sent to Eustone," and returned it to Oxford; however, on Mr. Ramsay going to the Eustone post-office on the next day, and asking the prisoner for the letter addressed to Tomas Hicks, the prisoner denied all *knowledge of it; and after Mr. Ramsay had gone out for a police officer, leaving the prisoner with Mr. Forrest, who had [*630 accompanied him to Eustone, the prisoner put some paper into the fire, and on Mr. Forrest taking it out, he found that it contained the two marked half-sovereigns that Mr. Ramsay had sent in the letter addressed to Tomas Hicks.

POLLOCK, C. B.—I presume, Mr. *Whateley*, that you mean to confine yourself to the counts for larceny.

Whateley.—This case is distinguishable from that of *Regina v. Rathbone*, C. & Mar. 220.(a)

*POLLOCK, C. B.—By the 47th section of the stat. 1 Vict. c. 36, [*631 "for the interpretation of the Post-office laws," it is enacted, "that the following terms and expressions shall have the several interpretations hereinafter respectively set forth, unless such interpretations are repugnant to the subject, or inconsistent with the context of the provisions in which they may be found, that is to say," and after a number of others, there is

(a) In the case of *Regina v. Richard Newey*, tried at the Central Criminal Court on the 16th June, 1843, the prisoner was indicted for stealing "a post-letter," containing a sovereign, the property of the postmaster-general. The indictment also charged the prisoner with a larceny, in stealing the sovereign. It appeared in evidence, that, in consequence of some suspicion being entertained, a sheet of paper was folded up as a letter by a person connected with the post-office, and addressed "Mr. Nichols, George Street, Manchester," which was a feigned address. In the sheet of paper was enclosed a marked sovereign, and it was then posted at the Ponders-end post-office, where the prisoner was on duty. When the bag was made up there, Mrs. Osborne, the postmistress, in the presence of the prisoner, examined the letter, and expressed her opinion that it contained money, in which opinion the prisoner coincided; and by mistake, Mrs. Osborne, while engaged in conversation with the prisoner, neglected to stamp the letter, and it was put into the bag in the precise state in which it had been posted. The prisoner (as was his duty) went with the letter-bag to the post-office at Enfield, where he was met by a constable. On examining the bag, it was discovered that the letter in question was missing, and on the prisoner being taxed with taking the letter, he denied all knowledge of it, but, when about to be searched, he took the letter from his pocket, said it was of no use denying the fact, and begged to be forgiven.

Clarkson, for the prisoner, submitted, that the count in the indictment which charged the prisoner with stealing "a post-letter" could not be sustained, inasmuch as the paper contained no writing, and was addressed to an imaginary person, and it did not bear any post-mark, a circumstance which did not occur through any act or omission of the prisoner. He cited the case of *Regina v. Rathbone*, and the stat. 1 Vict. c. 36, s. 47.

Baron Gurney said that he should not decide the point, but would confer with some of the other learned judges upon it. No judgment was delivered on the point, but, on the 19th of June, 1843, the prisoner was sentenced to be transported for *twelve* years, a judgment which would not have been correct on the count for larceny.

this interpretation of the words "post letter:" "and the term 'post-letter' shall mean any letter or packet transmitted by the post under the authority of the Postmaster-general, and a letter shall be deemed a post-letter from the time of its being delivered to a post-office to the time of its being delivered to the person to whom it is addressed." This letter, if letter it be, is a fictitious one, and is not addressed to any person that ever existed. I do not think this can be considered a letter at all, and if so, it was certainly not a post-letter.

On the part of the prosecution, Mr. Ramsay was called: he said, "I am superintendent of the missing letter department. On the 5th of November, 1844, I addressed a letter 'Tomas Hicks, to be left at the Checkers, Radford-lane, Exeter. With speed.' I placed two stamps on it, and took it to the Oxford post-office, and placed it among the letters going to Eustone. I had put two half-sovereigns in it. I sealed it with red wax, and made the impression of a key. It was put into the Eustone bag, and despatched by the mail cart to Eustone. I went on the next morning with Mr. Forrest to Eustone; I saw the prisoner; I told her who I was, and cautioned her not to say any thing to criminate herself. I asked her for the letter to *632] Hicks; she said none such had reached her office, as she opened 'the bag herself. I went out, and I left Mr. Forrest with her in the office.

Mr. Richard Augustus Forrest was called; he said, "I went with Mr. Ramsay to the Eustone post-office on the 6th of November, and there saw the prisoner. Mr. Ramsay inquired for a letter addressed to Tomas Hicks. The prisoner said that no such letter had come. He said, he was positive it had, and if it was not produced he must go for a constable. He went out and I remained with the prisoner, who put her hand into her pocket and crumpled up something like paper, and put it on the fire. I took it out, and it was paper containing two half-sovereigns, which I gave to Mr. Ramsay on his return, about five minutes after."

It was proved by Mr. Ramsay, that the two half-sovereigns were the marked ones which he had enclosed in the letter addressed to "Tomas Hicks."

Greaves, for the prisoner.—I submit, that this is no larceny. Mr. Ramsay sends this letter for the prisoner to receive it, and it is not taken *invito domino*.

POLLOCK, C. B.—Would a person, by putting a bundle or a parcel into the hands of a suspected servant, give him leave to steal it?

Greaves.—If a letter is put into the hands of a person not a servant, to test his honesty, and he keeps it, that is, as I submit, no larceny. In the case of *Rex v. Egginton*, 2 East, P. C. 666, (a) Mr. Boulton, the owner of goods, knowing of an intention in the prisoners to steal them, they having plotted so to do with his servant, directed his servant to carry on the business, with a view to the detection of the thieves; in consequence of which, the servant, *633] with the consent of his master, agreed with the prisoners to open the outer-door to them, and let them into the house, where they broke open inner apartments and took the goods; and there Mr. Justice LAWRENCE doubted whether it could be said to be done *invito domino*, where the owner had directed his servant to carry on the business, to open the door, and meant that the prisoners should be encouraged by the presence of that servant, and that by his assistance they should take the goods so as to make a complete felony, though he did not mean that they should carry

them away.(a) In the present case, the moving party was the prosecutor, and this transaction never could have occurred but for the act of the prosecutor. The thing was put into the actual possession of the prisoner by the voluntary act of the prosecutor himself; and if the prosecutor had brought an action of trespass, might not the prisoner have pleaded leave and license?

POLLOCK, C. B.—The moment that the prisoner opened the letter, and took the two half-sovereigns out of it and put them into her pocket, she became a trespasser *ab initio*.

**Greaves*.—The object of Mr. Ramsay, was, that she should open it. [*634

POLLOCK, C. B.—No. The object was, that the person who did open it should be detected.

Greaves.—This is like the case of my putting a watch in a man's pocket in the street, and his afterwards selling it, which would be no larceny in him; and it should be observed here, that, with respect to Mr. Ramsay, the prisoner was a bailee, and not a servant.

Keating, on the same side.—In this matter the prisoner cannot be considered as the servant of the Post-office. It could only be a larceny from Mr. Ramsay, and then the question as to bailor and bailee arises; and it is only the same as if Mr. Ramsay had given the letter to the prisoner for a special purpose, and if she had no intent to steal it at the time when it was delivered to her, a subsequent conversion would not be larceny. In the case of *Rex v. Leigh*, 2 East, P. C. 694, where it was found by the jury, that the prisoner, who assisted in taking the prosecutor's goods from a fire, in his presence, but without his desire, and who afterwards concealed and denied having them, yet took them honestly at first, and that the evil intention to convert them came on the taker afterwards, it was held to be no larceny.

POLLOCK, C. B.—I have no doubt whatever on this point. I think there is nothing in it.

Greaves addressed the jury for the prisoner.

Whateley, for the prosecution, claimed the right to *reply, on the ground that he represented the Attorney-general. [*635

Greaves.—This is not a prosecution by the Attorney-general; it is a prosecution instituted by the Post-office, and is in the same situation as any prosecution by any other of the public departments, and the Attorney-general very probably never heard of the case.

POLLOCK, C. B.—I have no doubt that Mr. *Whateley* has the right to reply.

Greaves.—Have not I a right to call for the Attorney-general's fiat to show that this is a prosecution instituted by him for the Crown?

(a) With respect to the larceny, the majority of the judges "thought that there was no assent in Boulton; that, his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had; and that this could no more be considered an assent, than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts. That there was no distinguishing between the degrees of facility a thief might have given to him; that it could only be considered as an apparent assent; that Boulton never meant that the prisoners should take away his property; and the circumstance of the design originating with the prisoners, and Boulton's taking no steps to facilitate or induce the offence until after it had been thought of and resolved on by them, formed, with some of the judges, a very considerable ingredient in the case, and differed it much from what it might have been if Boulton had employed his servant to suggest it originally to the prisoners." 2 East, P. C. 687.

POLLOCK, C. B.—There is no such fiat ever given. If this is a prosecution by the Attorney-general, those who represent him, though not usually counsel for the Crown, have the right to reply, as in the Mint cases at the Old Bailey. (a)

*636] *Wheateley* replied.

POLLOCK, C. B., (in summing up.)—I entertain no doubt that the prisoner's taking the half-sovereigns in the manner described is a larceny at common law, and if this letter was opened by the prisoner, and the half-sovereigns taken out, in my opinion she was guilty of a larceny.

Verdict—Guilty of larceny.

Wheateley, Godson, W. J. Alexander, and Bros., for the prosecution.
Greaves and Keating, for the prisoner.

(a) In the case of *Rex v. Marsden, Alexander, and Isaacson, M. & M. 439*, which was an indictment which charged that the defendant, intending to vilify the Duke of Wellington, one of his majesty's ministers, and to cause it to be believed that he was guilty of disloyal intentions against the king, and to bring him into hatred and contempt, published a libel on him in a newspaper called "The Morning Journal," the Attorney and Solicitor-general, and the usual counsel for the crown, conducted the prosecution, and the solicitor of the Treasury was the attorney. No witnesses were called for the defence, and, on the Attorney-general (Scarlett) rising to reply, Humfrey, for the defendant Isaacson, objected to his doing so, on the ground that this was a private prosecution instituted by the Duke of Wellington, as a private individual, and not a public proceeding on behalf of the crown. The Attorney-general stated that he appeared in his official character. Lord Tenterden, C. J., said—"There is no doubt of the rule, wherever the king's counsel appears officially, he is entitled to reply." In the case of *Rex v. Bell*, Id. 440, which was a criminal information for a libel on the Lord Chancellor, published in "The Atlas" newspaper, of which the defendant was editor, which was tried on the same day as the case of *Rex v. Marsden*, the Attorney-general conducted the prosecution, and stated that he appeared as the counsel and private friend of the Lord Chancellor; and no evidence being offered for the defence, he did not reply." In the "practice to be observed on trials for felony, where the prisoner has counsel," which was considered at a meeting of the twelve judges in 1837, (7 C. & P. 676,) it is stated, that, "in cases of public prosecutions for felony instituted by the crown, the law officers of the crown, and those who represent them, are in strictness entitled to the reply, although no evidence is produced on the part of the prisoner."

*637]

* WORCESTER ASSIZES.

(*Crown Side.*)

BEFORE LORD CHIEF BARON POLLOCK.

REGINA v. DINGLEY and Nine Others.

Several prisoners being in custody on a charge of murder, A., who was one of them, said to the chaplain of the prison, that he wished to see a magistrate, and asked if any proclamation had been made, and any offer of pardon. The chaplain said, that there had, but he hoped that A. would understand that he could offer him no inducement to make any statement, as it must be his own free and voluntary act. When A. saw the magistrate, he said that no person had held out any inducement to him to confess any thing, and that what he was about to say was his own free and voluntary act and desire. A. then made a statement to the magistrate:—*Held*, that this statement was receivable against A. on his trial for the murder.

Where a prisoner sent for a magistrate to make a statement to him, and the magistrate took down the conversation which passed between him and the prisoner, and wrote it immediately, under the usual heading of a prisoner's statement, and read this over to the prisoner before the prisoner signed his statement, which followed it, the judge

directed this memorandum of the conversation to be read before he decided on the admissibility of the statement in evidence, instead of the magistrate stating orally what passed between him and the prisoner.

MURDER.—The indictment charged all the prisoners as principals in the wilful murder of Thomas Staite, on the 19th of December, 1844, by striking and beating him with bludgeons and guns.

On the part of the prosecution, it was proposed to give in evidence a statement, made by the prisoner Dingley, to Mr. Curtler, a magistrate; but, before it was offered in evidence,

The Rev. John Adlington, the chaplain of the jail, was called. He said, "On the 19th of February the prisoner Dingley sent for me, and I went to him. He asked me if I had any tracts upon perjury. I asked why he wished to have a tract. He said he thought it was very hard some of the prisoners should have their lives taken away wrongfully. He asked if any magistrate would come that day; he said he wished to see a magistrate, to make a statement respecting the charge; and then said, 'Has any proclamation been made? any offer of pardon?' I said, proclamation had been made some time, and an offer of pardon. *He then said, if any person should make known the circumstances, it [*638 would be impossible for him to go back to Pershore. I then said, that any person who made such a statement would probably not think of going back to Pershore. I said to him, that, if he made a statement, I hoped he would understand that I could offer him no inducement, as it must be his own free and voluntary act." In his cross-examination, Mr. Adlington said, "When he asked if there was a proclamation, I believe there was something said that the reward would enable a person to go elsewhere. Mr. Curtler came in in about three-quarters of an hour."

Mr. Curtler was called. He stated that he was a magistrate, and that he was sent for to the jail, and that what passed between him and the prisoner Dingley, before the latter made a statement, was reduced into writing.

POLLOCK, C. B.—As it is reduced into writing, the better course would be to have it read.

It was read by Mr. C. Bellany, the clerk of arraigns, and it was as follows:—

"The voluntary information and confession of Francis Dingley, a prisoner confined in Worcester county jail on a charge of murdering Thomas Staite, taken at the said jail, this 19th day of February, 1845, before me Thomas Gale Curtler, Esq., one of her majesty's justices of the peace for the said county of Worcester:

"Who saith, in answer to questions put by the said Thomas Gale Curtler, 'I wish to make a statement of what I know. I have told Mr. Adlington so, and desired him to send for a magistrate. No person has made any promise, or held out any inducement to me to confess any thing. Mr. Adlington is the only person I have said any thing to; he has not made me any promise, or held out any inducement to me; what I have said to him, and what I am now about to say, is my own free and voluntary act and desire.' The said Thomas Gale Curtler having read over to the said Francis Dingley the foregoing statement, informed him he was at liberty to say any thing he might wish, and that it would be the said Thomas Gale Curtler's duty, as a magistrate, to take it down in writing. *The said Francis Dingley voluntarily saith as follows:—[Here followed the statement.]" [*639

Godson and Huddleston, for the prisoners.—This statement ought not to be received in evidence. From what has been stated by Mr. Adlington, it is manifest that the motive which induced the prisoner to make the statement was the offer of pardon by the Secretary of State. He clearly made this statement with a view to benefiting himself; and when the inducement

is to be considered, what comparison can be made between an inducement held out by a prosecutor or a constable who may promise favour without having the power to grant it, and the promise of her majesty's government, made through her Secretary of State?

F. V. Lee and Whitmore, for the prosecution.—In the present case, so far from the prisoner being induced to make a statement by the Secretary of State's offer of a pardon, it is shown distinctly by the evidence of Mr. Adlington, that he told the prisoner that he "could offer him no inducement" to make any statement; and so well did the prisoner understand this, that he says to Mr. Curtler, "No person has made any promise, or held out any inducement to me to confess any thing. Mr. Adlington has not made me any promise, or held out any inducement to me; and what I am about to say is my own free and voluntary act and desire." In the case of *Regina v. Boswell*, C. & Mar. 584, it was held that the knowledge of a government reward and promise of pardon by a prisoner before he made a statement, or even his asking to have handbills of that kind shown to him, and their being so shown, were no grounds for not receiving his statement in evidence, unless it appeared that the prisoner made the statement when *640] influenced by the hope of pardon, held out by "authorized parties. There, the prisoner said, that, as the government had offered a free pardon, he would tell all he knew. Here, the prisoner, instead of being so influenced, says expressly that no inducement has been held out to him.

Godson, in reply.—The inducement held out is her majesty's pardon. The prisoner is told of this, and desires to see a magistrate. Does he do this to accuse himself and with a view of getting himself punished, or does he do it to benefit himself, and with a view of getting himself pardoned? It is quite manifest that the latter was the motive that influenced the prisoner. And with respect to the statement that it was voluntary, and by his own desire, there is no doubt that it was so in one sense, inasmuch as it was not extorted from him by any threat or any thing of that sort; but it is equally clear, that it was made to save himself, by means of the pardon offered by the Secretary of State.

POLLOCK, C. B.—In this case it may not be necessary to point out a distinction between a reward and promise of pardon by her majesty's Secretary of State publicly offered, and an inducement to make a statement held out by a private individual; still, in some cases, an important distinction must be made between a statement which never can be receivable in evidence, and one which may. A queen's evidence, who refuses to make a full disclosure, may be convicted on the confession he has made with a view to his being admitted queen's evidence. I collect from the decision in *Boswell's case*, that, before a statement can be excluded on the ground that it was made in the hope of a pardon, it must appear that that motive was operating on the prisoner's mind, and in that case, up to the moment when that was shown, my Brothers *PATTESON* and *CRESSWELL* held the statements of the prisoner to be receivable, though the prisoner knew of *641] the reward and the promise of a "pardon having been offered by the Secretary of State; but when it appeared that *Boswell* had made the communication, stating "he saw no reason why he should suffer for the crime of another, and that, as government had offered a free pardon to any of the parties concerned who had not struck the blow, he would tell all about the matter," it was held that the statement was inadmissible, as it appeared that the prisoner was influenced by the hope of pardon held out by authorized parties. In the present case, Mr. Adlington said to the

prisoner Dingley, after the pardon had been alluded to, that he hoped he would understand that he (Mr. Adlington) could offer him no inducement, it must be his own free and voluntary act; and what Mr. Curtler says to him is very nearly to the same effect. I think that the statement of the prisoner Dingley must be received.

The statement was given in evidence.

The jury found all the prisoners guilty of manslaughter.

F. V. Lee and *Whitmore*, for the prosecution.

Godson and *Huddleston*, for the prisoners.

*STAFFORD ASSIZES.

[*642

(*Civil Side.*)

BEFORE LORD CHIEF BARON POLLOCK.

WHITEHOUSE, Administrator of SARAH WHITEHOUSE, v. ABBERLEY.

In debt against an executor for a legacy, which, it was alleged, he was, by agreement with the legatee, to retain and to pay interest upon it, the defendant pleaded the Statute of Limitations. It was proposed to take the case out of the Statute of Limitations, by putting in letters written by the defendant's son, who assisted him in his trade, and received for him money due to him in the way of his business as a shoe manufacturer:—*Held*, that, though this would be good evidence to show that the son was his father's agent in matters relating to the father's trade, it was not such evidence of agency as would render the letters of the son admissible in evidence in this case.

DEBT.—The declaration stated that the defendant was indebted to the plaintiff's late wife for money had and received by the defendant as executor of Joseph Abberley, deceased, for a legacy by his will bequeathed to the plaintiff's late wife for her separate use, and remaining in the defendant's hands, and retained and forborne to him for certain interest, payable in respect thereof, at his request and by the assent of the plaintiff's late wife.(a)

(a) The commencement of the record and the declaration were in the following form:—

"Staffordshire, to wit.—In the Exchequer of Pleas.—On the 23d day of January, A. D. 1845.

"Thomas Whitehouse, the plaintiff in this suit, before and at the time of the commencement of this suit, and still being administrator of all and singular the goods, chattels, and effects which were of one Sarah Whitehouse, deceased, at the time of her death, and who died intestate, (and which Sarah was at the time of the accruing of the debt hereinafter mentioned, and until the time of her death, the wife of the said plaintiff,) by Arthur William Tooke, his attorney, complains of John Abberley, the defendant in this suit, who has been summoned to answer the said plaintiff by virtue of a writ issued on the 5th day of December, A. D. 1844, out of the court of our lady, the queen, before the barons of her Exchequer at Westminster, in an action of debt; and the said plaintiff demands of the said defendant the sum of £200, which he unjustly detains from the said plaintiff as such administrator as aforesaid. For that, whereas the said defendant, in the lifetime of the said Sarah Whitehouse, to wit, on the 1st day of July, A. D. 1844, and from thence continually until and at the time of the death of the said Sarah the said wife of the said plaintiff, was indebted to the said Sarah, and the said plaintiff in right of his said wife, in £200, for money before then and during the intermarriage of the said plaintiff and the said Sarah his wife had and received by the said defendant as executor of the last will and testament of one Joseph Abberley, deceased, for and on account of a certain legacy by his said will before then bequeathed, given,

*643] *Pleas—1st, *nunquam indebitatus* in manner and form as the plaintiff hath in his said declaration alleged; 2dly, the Statute of Limitations; 3dly, payment to the plaintiff and his wife during the lifetime of his wife.

*644] *Replication to the second plea, that the cause of action did accrue within six months; and to the third plea, a denial of the payment.

It was opened by *Allen*, for the plaintiff, that the late John Abberley (whose executor the defendant was) had left a legacy to the plaintiff's late wife, and that it had been arranged between the parties that the defendant should retain the legacy in his hands and pay interest for it, which, for some time, he had done.

To take the case out of the Statute of Limitations, *Allen*, for the plaintiff, proposed to put in several letters written by the defendant's son.

It was proved that the defendant's son lived with him and assisted him in carrying on his trade, kept his books, made out his invoices and accounts, and received money for him in the way of his business of a shoe manufacturer.

POLLOCK, C. B.—This would be very good evidence to show that the defendant's son was his agent for him in the way of his trade, and would show that in the way of his trade the defendant had authorized his son to act for him and receive money for him; but this is no evidence to show that his son was authorized to make admissions for him as to a legacy or executorship accounts. To show agency as to these executorship accounts, evidence must be given of some authority pointing to these accounts.

Nonsuit.

Allen and *John Gray*, for the plaintiff.

Godson and *F. V. Lee*, for the defendant.

and directed to be paid to her for her own sole and separate use, independent of her then present husband, the said plaintiff, or any after-taken husband, and then and from thence continually remaining in the hands of the said defendant, over and above and after the payment of all debts, liabilities, and other legacies, due and incurred by him as such executor as aforesaid, and then and during their said intermarriage retained and forborne to him the said defendant for certain interest payable in respect thereof, and on his own account, and at his request and by and with the sufferance and assent and permission of the said Sarah and the said plaintiff in that behalf, and which said debt has not at any time as yet been reduced into possession by the said plaintiff and his said wife, or either of them, and is still unpaid, unsatisfied, and undischarged, whereby and by reason of the non-payment of the said sum of £200, being the said sum above demanded, an action hath accrued to the said plaintiff, as such administrator as aforesaid, to demand and have the same of and from the said defendant, yet the said defendant hath not paid the said sum above demanded, or any part thereof, to the said plaintiff's damage, as such administrator as aforesaid, of £200, and thereupon he brings suit, &c. And the said plaintiff brings into court here the letters of administration of all and singular the goods, chattels, and credits which were of the said Sarah Whitehouse, deceased, at the time of her death, and which said letters of administration were after the death of the said Sarah Whitehouse, to wit, on the 25th day of November, A. D. 1844, and before the commencement of this suit, granted to the said plaintiff by the Consistory Court of the Bishop of Lichfield and Coventry, in due form of law, and which give sufficient evidence to the said court here of the grant of administration to the said plaintiff as aforesaid, the date whereof is a certain day and year therein mentioned, to wit, the 25th day of November, 1844, aforesaid."

*WOOD *v.* COOPER and Others.

[*645]

On the trial of an issue directed by the Court of Chancery to try whether a deed of assignment was fraudulent or not, a witness was called to prove that another deed, which bore date more than three years before the trial, was not executed on the day on which it bore date, but was executed by one party on the day after, and by the other three days after. The witness stated, that he could not recollect how this was, but stated that he had been examined on this subject before commissioners of bankrupt within a fortnight of the time when the matters occurred, and when the facts were fresh in his memory. He stated that his examination before the commissioners was not in his own handwriting, but he had signed it. The witness was allowed to look at his examination, to refresh his memory.

Issue directed by the Court of Chancery to try, first, whether an indenture, dated the 20th day of March, 1841, "was a fraudulent grant or conveyance" by John Jones, "with intent to defraud and defeat his creditors;" and, secondly, whether the said John Jones executed the said indenture fraudulently, or with a fraudulent intention.

The declaration stated, "that, before and at the time of the making of the discourse hereinafter mentioned, a certain suit had been and was depending in the high Court of Chancery, in which said suit the now plaintiff was plaintiff, and the now defendants were defendants, and a certain indenture of release, conveyance, and assignment, dated the 20th day of May, A. D. 1841, and made between one John Jones, in the pleadings in the said suit named, of the one part, and the now defendant William Cooper, of the other part, was mentioned in the pleadings in the said suit, and had been and was exhibited in the said suit, and marked as such exhibit with the letter H, and which release, conveyance, and assignment purported to be, and was, a grant or conveyance and assignment of certain tenements and premises, and of a bond debt as therein mentioned." The declaration then went on to state that a question arose, "whether the said indenture was a fraudulent grant or conveyance by the said John Jones, with intent to defraud and defeat his creditors, and whether the said John Jones executed the said indenture fraudulently or with a fraudulent intention." It then raised the issue in the usual form.

On the part of the plaintiff, Mr. Turton was called to prove that he had prepared an assignment from John Jones and a person named Boon, for the benefit of their creditors, dated on Sunday the 20th of June, 1841, and that it was not executed on the day it bore date, but was executed by Boon on the day after, and by John Jones *three days after. Mr. Turton could not recollect whether that deed was executed on the day of [646 the date, or not. He was asked by *Whitmore*, for the plaintiff, whether he had not been examined on the subject before commissioners of bankrupt, and he said that he had; and his examination before the commissioners, taken on the third day of July, 1841, was put into his hand. But, in answer to a question put by *W. J. Alexander*, for the defendants, the witness stated that the examination was not in his own handwriting, but that he signed it.

W. J. Alexander.—As the examination is not in the witness's own handwriting, I submit, that he cannot be allowed to refresh his memory by looking at it.

POLLOCK, C. B., (to the witness).—Was that deposition made by you near the time when the matters mentioned in it occurred?

The witness.—It was, my Lord.

POLLOCK, C. B.—Were the facts there stated then fresh in your memory?

The witness.—They were.

POLLOCK, C. B.—Under these circumstances, the witness may look at the deposition, to refresh his memory.

The witness did so.

Verdict for the plaintiff.

Tulfourd, Serjt., *Whateley* and *Whitmore*, for the plaintiff.

W. J. Alexander and *F. V. Lee*, for the defendants.

***647] *JOSEPH BRINDLEY and DAVID BRINDLEY v. WOODHOUSE.**

In covenant on a lost deed with *non est factum* pleaded, it was proved, that, on search, the deed, which by the date was sixty years old, could not be found in the muniment-room of the plaintiff, but that there was found there a paper which purported to be an attested copy of it. It was proved that both the persons whose signatures were to it as attesting the copy were dead; and the handwriting of one of them was proved; and it was also proved that persons of the same names as those who had attested the original deed were also dead:—*Held*, that, upon this proof, this paper was not receivable as secondary evidence of the deed.

COVENANT.—The declaration, which consisted of only one count, was on articles of agreement, under seal, (which were stated to have been lost by time and accident,) and which were dated the 6th day of November, 1783, and were between Henry Brindley, of the one part, and John Routh, of the other part; whereby H. B. demised certain premises, situate at Heaton, from the 5th of April, 1784, for the term of 100 years, with a covenant to repair. The declaration then went on to state that the plaintiffs were assignees of the reversion, and also stated that the defendant was assignee of the term. Pleas—1st, that the deed was not the deed of John Routh; 2dly, a special plea, on which no question of law arose.

On the part of the plaintiff, Mr. Thomas Cooper, the plaintiff's attorney, was called. He stated that he had gone to the muniment-room of the plaintiff, Mr. Joseph Brindley, and there found a bag containing his title-deeds, and that, on searching, he found in that bag what purported to be an attested copy of a deed, of the 6th of November, 1783, and which corresponded with that stated in the declaration, and which attested copy purported to have been attested by two witnesses, named Gretton and Jones. This witness further stated, that he went to the muniment-room of the other plaintiff, Mr. David Brindley, but did not find there either the deed of the 6th of November, 1783, or any thing relating to it.

It was proved by the Rev. Thomas Gretton, that his father, who was an attorney, was dead, and that the signature on the attested copy, which purported to be that of one of the persons who had examined the copy with the original and attested it, was of the handwriting of his father. It was *648] proved that Mr. Jones was an attorney, and that he was dead, but his handwriting was not proved; and it was also proved that two persons of the names of the attesting witnesses to the original deed were dead.

Upon this evidence, *Whateley*, for the plaintiff, proposed to put in the attested copy of the deed of the 6th of November, 1783.

Tulfourd, Serjt.—I submit, that it is not receivable in evidence.

Whateley.—In the last edition of Mr. Roscoe's work on Evidence,^(a) there is this passage:—"It is said that an old instrument, purporting to be a copy or abstract of a conveyance, and which had for many years gone along with possession of the land, was admitted in evidence, the original being lost, without proving it to be a true copy." For this proposition Buller's *Nisi Prius* is cited,^(b) and Bacon's Abridgment referred to.^(c)

POLLOCK, C. B.—I have no doubt that it is stated in Mr. Roscoe's work as you have read it, but I never heard of such evidence being given.

Whateley.—In Buller's *Nisi Prius*,^(d) it is laid down, that, "where possession has gone along with a deed many years, the original of which is lost or destroyed, an old copy or abstract may be given in evidence without being proved to be true; because, in such case, it may be impossible to give better evidence." And for this proposition, Style, 205, is cited.^(e)

*POLLOCK, C. B.—I am of opinion, and shall act on that opinion, [*649 that this evidence ought to be rejected.

The evidence was rejected.

There was a verdict for the defendant, his lordship giving leave to move to enter a verdict for the plaintiffs on the point above reported; but no motion was made, as the case was compromised.

Whateley, *F. V. Lee*, and *Symons*, for the plaintiffs.
Talfourd, Serjt., and *John Gray*, for the defendant.

(a) Rosc. L. of Ev., 6th ed., pp. 9, 10.

(b) B. N. P. 254.

(c) Bac. Ab. *Evid.* (F.) p. 298.

(d) B. N. P., 1st ed., (1772,) p. 250; and 6th ed., (1793,) p. 244.

(e) In the 7th edition of B. N. P., by Mr. Bridgman, (1817,) the same passage occurs; but the editor says, "Sty. 205 is here referred to, but there is no such point." And, in Bac. Abr., tit. *Evidence*, (F.) 7th ed., p. 298, it is said, that, "where the possession has gone along with any deed for many years, there a very old copy of the deed may be given in evidence, with proof also that the original is lost; and that is according to the rule of the civil law, *si vetustate temporis et judiciaria cognitione sint roborata*, for possession could not be supposed to go along in the same manner, unless there had been originally such a deed, and so executed as the copy mentions, and the copy cannot be supposed to be only offered in evidence to avoid sight of the original, since it is so ancient that the antiquity alone prevents all suspicion of its being counterfeit, and the antiquity is known from the ancientness of the possession; but *qu.*, whether such a copy shall be received, without the proof of its being a true copy by comparison with the deed itself?"

*650]

*SHREWSBURY ASSIZES.

(Crown Side.)

BEFORE LORD CHIEF BARON POLLOCK.

REGINA v. WILLIAM STRONER.

On the trial of an indictment for a rape, the prosecutrix, a servant, stated that she made almost immediate complaint to her mistress, and that on the next day a washerwoman washed her clothes, on which were blood. Neither the mistress nor the washerwoman were under recognisance to give evidence, nor were their names on the back of the indictment, but they were at the assizes attending as witnesses for the prisoner. The judge directed that both the mistress and the washerwoman should be called by the counsel for the prosecution, but said that he should allow the counsel for the prosecution every latitude in their examination.

RAPE.—The prisoner was charged with having ravished Hannah Whitbrook, on the 5th day of February, 1845, at the parish of Shiffnall.

The prosecutrix stated, in giving her evidence, that at the time of the offence, which was committed on Ash-Wednesday, 1845, she was in the service of Mr. Smith, and that the offence was committed in Mr. Smith's cow-house, and that almost immediately after the commission of the offence she complained of it to Mrs. Smith, and showed Mrs. Smith some blood in the cow-house, and that Mrs. Smith said, "Pooh!" And the prosecutrix also stated, in giving her evidence, that on Thursday, the 6th day of February, her clothes were washed by a washerwoman named Chatwood, and these clothes had blood upon them.

Neither Mrs. Smith nor the washerwoman Chatwood had been bound by recognisance to give evidence on this trial, and their names were not on the back of the indictment.

POLLOCK, C. B., inquired if either Mrs. Smith or the washerwoman were in attendance.

W. H. Cooke, for the prisoner.—They are both here attending as witnesses for the prisoner.

*651] POLLOCK, C. B.—They must be both called as witnesses *for the prosecution; but I shall allow the counsel for the prosecution every latitude in examining them.

Allen, for the prosecution, called Mrs. Smith, who denied that the prosecutrix had ever made any complaint whatever to her, or had ever shown her any blood anywhere; on which, at the suggestion of the learned Lord Chief Baron, the prosecution was abandoned.

Verdict—Not guilty.

Allen, for the prosecution.

W. H. Cooke, for the prisoner.

MONMOUTH ASSIZES.

(Civil Side.,

BEFORE BARON PLATT.

PRICKETT v. GRATREX, Esq.

A notice of action to a magistrate for having caused the plaintiff to be imprisoned, sufficiently states the *place*, if it states the place in which the plaintiff was imprisoned, although it does not state any place at which the magistrate signed any warrant or did any act which caused the plaintiff's imprisonment. Whether, in such a case, the notice must state the *form* of the intended action, *quære?*

FALSE imprisonment.—The declaration stated that the defendant assaulted the plaintiff, and caused him to be apprehended and unlawfully committed to a certain common jail, or prison, in the borough of Monmouth, in the county of Monmouth, and to be there imprisoned for the space of four months. Plea, not guilty “by statute.”

It was opened, by *Godson*, for the plaintiff, that the defendant was one of the magistrates of the borough of Monmouth, and he had committed the plaintiff to prison for *refusing to find sureties to keep the peace, [“652 the warrant by which he was committed being (as he contended) wholly bad.

It was proved, that, on the 5th of December, 1843, the defendant was served with a notice of action in the following form :—

“To Thomas Gratrex, Esquire, one of her majesty's justices of the peace in and for the borough of Monmouth. Sir—You having, on or about the fourteenth day of March last, as one of her majesty's justices of the peace in and for the said burgh of Monmouth, caused me to be apprehended and unlawfully committed to a certain common jail, or prison, *in the borough of Monmouth aforesaid*, and to be *there* imprisoned, and kept and detained in prison *there*, without any reasonable or probable cause whatsoever, for a long space of time, to wit, from the said fourteenth day of March to the ninth day of August then next following, I do, therefore, according to the form of the statute in such case made and provided, hereby give you notice, that I shall, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be sued out of her majesty's Court of Queen's Bench at Westminster against you, at my suit, for the said imprisonment, and shall proceed against you thereupon according to law. Dated this fourth day of December, 1843.

“JAMES PRICKETT.”

This notice was endorsed “Joseph Lewis, of Blakeney, in the parish of Awre, in the county of Gloucester, attorney for the within-named James Prickett.”

Whateley, for the defendant.—I submit, that this notice of action is not sufficient. It is not stated in the notice at what place the defendant did the act complained of. The words of the notice are, “you having” “caused me to be apprehended and unlawfully committed to a certain common jail, or prison, in the borough of Monmouth.” It states where the plaintiff was imprisoned, but it ought also to have stated where the defendant did any act which caused that imprisonment. In the case of *Martin v. Upcher*, 2 G. & D. 716, 3 Q. B. Rep. 662, and 11 Law J., (N. S.,) Q. B., 291, the notice of action was held bad, because it did not

*653] state the place at which the imprisonment occurred; *and, in that case Lord DENMAN, C. J., says, that the act of Parliament “requires that a notice in writing of the intended writ or process shall be delivered to the justice, in which notice shall be clearly and explicitly contained the cause of action, &c.; and I think that such notice is not clear and explicit unless it contains a statement of the place *where the alleged grievance was committed*.” Now, the place where the alleged grievance was committed in the present case was the place where the warrant was made. In the case of *Breese v. Jerdein, Beaumont, and Bradley*, 2 G. D. 720, n., 4 Q. B. Rep. 585, and 12 L. J. (N. S.) Q. B. 234; a notice of action, which stated that the three defendants had, on the 27th of May, apprehended the plaintiff, not mentioning any place, and that they *afterwards* “caused him to be unlawfully committed to a certain common jail, or prison, called the Compter, in the city of London, and to be there imprisoned,” was held to be insufficient as to the defendant Beaumont, who was the only one of the defendants who was entitled to notice of action, on the ground that the want of a sufficient statement of time and place rendered the notice bad,^(a) and in that case the notice was in the same form as it is in the present case.

PLATT, B.—Not quite. In the case of *Breese v. Jerdein* the first act complained of has no locality at all assigned to it.

Whateley.—In the present case the form of the action is also not mentioned in the notice.^(b)

*654] **Greaves*, for the defendant.—The place of the act done by the defendant is the place at which he signed the warrant.

PLATT, B.—I do not feel much difficulty about this notice. In the notice given in the case of *Martin v. Upcher* no place was stated at all, and in *Breese v. Jerdein* the earlier part of the imprisonment is also without any place being mentioned; but I think the law ought not to be construed with so much strictness as is contended for in the present case. In cases of this kind both parties are to be protected, and the object of the notice is to notify the matter with sufficient distinctness to enable the magistrate to know what it is, so that he may make a tender of amends if he is disposed to do so. In the present case, can any one doubt that when the defendant received this notice he did not know perfectly well what it referred to? I think the notice is sufficient.

The case proceeded, and there was a
Godson and Carrington, for the plaintiff.
Whateley and Greaves, for the defendant.

Verdict for the defendant.

In the ensuing term, *Godson* obtained a rule to show cause why there should not be a new trial, on grounds wholly distinct from the point above reported.

(a) It does not appear very clearly whether the defendant Beaumont could have been liable for the imprisonment at the *Compter*, the only place mentioned. The report in the Law Journal states that Beaumont and Bradley both took part in the proceedings at the station house, and Lord Denman says in his judgment, that it was objected “that the imprisonment in the Compter was not proved as the joint act of the three defendants.”

(b) In the case of *Breese v. Jerdein*, it was objected, that the notice of action did not designate the form of the intended action, but the court gave no opinion on this objection.

*COURT OF QUEEN'S BENCH.

[*655]

Sittings at Westminster after Michaelmas Term, 1844.

BEFORE LORD DENMAN, C. J.

PITCHER v. KING, Esq.

In an action against a sheriff for a false return to a *fi. fa.*, office copies of the *fi. fa.* and return, which are not proved to have been examined copies, are not receivable in evidence, even where the original cause was in the same court as the action against the sheriff.

CASE against the sheriff of Surrey, for a false return to a writ of *fi. fa.*

The original cause was in this court, and it was proposed on the part of the plaintiff, to put in office copies of the writ of *fi. fa.* and return.

Platt, for the defendant.—These copies are not receivable in evidence, without proof that they have been examined with the originals.

W. H. Watson, for the plaintiff.—In *Doe d. Lucas v. Fulford*, 2 Burr. 1179, it was decided that an office copy in the same court and in the same cause is evidence of the record of which it is a copy; and this is also laid down in Phillips's Law of Evidence.(a)

**Platt*.—Where a writ has been returned, the proper proof is a copy of the writ and return examined with the record. Mr. Justice BULLER says,(b) that, where the writ itself is the gist of the action, you must have a copy from the record, inasmuch as you are to have the utmost evidence the nature of the thing is capable of. [656]

(a) 2 Phill. on Ev., 9th ed., 131, where it is stated, that "the rule respecting the admission of office copies in evidence is, that an office copy in the same court and in the same cause is equivalent to a record, but, in another court, or another cause in the same court, the entry must be proved to be examined; but, in a note, (*Ib.*) it is said, that it seems that the rule has not been strictly acted upon in regard to affidavits before the same court, but not in the same cause." In the case of *Wightwick v. Banks*, Forrester, 153, the Court of Exchequer allowed an office copy of an affidavit made in another cause to be used in moving for a rule to discharge a defendant out of custody. In the case of *Casburn v. Reid*, 2 B. Moore, 60, in an action against a sheriff for an escape, the plaintiff averred in his declaration that a writ of *capias* was endorsed for bail, by virtue of an affidavit of the plaintiff's cause of action before then made and duly filed of record, and it was held by the Court of Common Pleas that the production of the office copy of the affidavit was sufficient to prove such averment. In the case of *Croke v. Dowling*, B. N. P., 7th ed., 13 a, (more fully reported in 3 Doug. 75,) in an action for maliciously holding to bail, the court held, 1st, That it was not necessary to prove that there was any affidavit to hold to bail, for the endorsement on the writ was sufficient. 2dly, That, if the declaration had averred that such an affidavit had been made, an office copy of it would have been sufficient; but, if it were stated to have been made by the defendant himself, perhaps the original affidavit must be produced and proved. See also the case of *Davies v. Davies*, 9 C. & P. 252.

(b) B. N. P., 7th ed., 234 a. "As to writs. When a writ is only inducement to the action, the taking out the writ may be proved without any copy of it, because possibly it might not be returned, and then it is no record; but where the writ itself is the gist of the action, you must have a copy from the record, inasmuch as you are to have the utmost evidence the nature of the thing is capable of, and it cannot become the gist of the action till it is returned

Lord DENMAN, C. J.—I think I ought not to receive the evidence.
 Evidence rejected. The plaintiff was ultimately nonsuited.
W. H. Watson and ———, for the plaintiff.
Platt, for the defendant.

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*REGINA v. GOLDSHEDE and SIDNEY.

On the trial of an indictment for a conspiracy, the answers in Chancery of the defendants, made on oath by them in a suit instituted against them by the prosecutor, are receivable in evidence on the part of the prosecution.

CONSPIRACY.—The *first* count of the indictment charged that the defendants did conspire, &c., to pretend that Richard Bingham was indebted to the defendant Sidney in the sum of £250, and to commence an action to recover it, and to cause Richard Bingham to be arrested and imprisoned until he gave bail or paid that amount, whereas in truth Richard Bingham was not indebted to either of the defendants in that sum. *Second* count, that the defendants did conspire, &c., to obtain £250 from the said Richard Bingham, by falsely pretending that Richard Bingham was indebted to the defendant Sidney in that amount, and by wrongfully causing Richard Bingham to be arrested; whereas in truth Richard Bingham was not indebted to the defendant Sidney in the said sum or any other sum. *Third* count, that, on the 20th of November, 1843, Richard Bingham, for the accommodation of Richard Shiel, had accepted a bill of exchange for £250, drawn by R. Shiel, payable to his own order, which bill of exchange was discounted to the defendant Goldshede for R. Shiel, and was then endorsed by R. Shiel to the defendant Goldshede; and that, after the bill became due, and while the defendant Goldshede was the holder of it, he received another bill of exchange, for £275, in satisfaction of and for the first-mentioned bill of exchange, and that afterwards the defendants conspired, &c., to pretend that the defendant Sidney was the lawful endorsee and holder of the first-mentioned bill of exchange, and entitled to receive from the said Richard Bingham the sum of £250 in respect of it. *Fourth* count, that Richard Bingham, for the accommodation of R. Shiel, accepted a bill of exchange for £250, which was discounted by the defendant Goldshede, and that R. Shiel, after that bill of exchange became due, and while the defendant Goldshede was the holder of it, endorsed to *658] the *defendant Goldshede another bill of exchange, for £275, in satisfaction of the first-mentioned bill of exchange, and that, after the bill of exchange for £250 was due, R. Shiel paid to the defendant Goldshede £220 on account of the last-mentioned two bills of exchange, and that the defendant afterwards did conspire, &c., to sue Richard Bingham for £250, and to procure him to be arrested, and to pretend that the defendant Sidney was the lawful holder of the bill of exchange for £250, and entitled to recover the amount of it. *Fifth* count, that Richard Bingham accepted an accommodation bill for R. Shiel for £250, and that the defendant Goldshede discounted it, and that, after it became due, R. Shiel paid to the defendant Goldshede £194 on account of it, and that the defendants afterwards did conspire, &c., to sue Richard Bingham in the name of the defendant Sidney for £250, and to pretend that the defendant Sidney was the lawful holder of the bill of exchange for £250, and entitled to recover the whole amount of it. *Sixth* count, that the defendants conspired to obtain from Richard Bingham the sum of £250, and

to cheat him thereof, by pretending that he was indebted to the defendant Sidney in the sum of £250, as endorsee of a bill of exchange, which Richard Bingham had accepted for R. Shiel's accommodation, and without value, as both the defendants well knew, and upon which R. Shiel had paid £194 to the defendant Goldshede, and which bill of exchange was colourably and fraudulently held by the defendant Sidney, as trustee for the defendant Goldshede. *Seventh* count, that the defendants did conspire, &c., without any probable cause, to arrest Richard Bingham, and to cause him to be imprisoned till he should give bail for a sum of money pretended to be due from him to the defendant Sidney. *Eighth* count, that the defendants did conspire, &c., "by means of divers false pretences, subtle means, and devices, to obtain and acquire to themselves divers moneys of the said Richard Bingham, and to cheat and defraud him thereof."

*On the part of the prosecution, *Thesiger*, S. G., proposed to give in evidence the answers in Chancery of the present defendants, which had been made by them on oath, in a suit in Chancery which had been instituted against them by the present prosecutor, Mr. Bingham. [659

Platt, for the defendant Sidney.—I submit that these answers are not receivable in evidence, because they are made upon oath under the compulsory process of the Court of Chancery. In a case of child-murder, tried at Guildford, it appeared that the prisoner had been taken before Dr. Lock, a magistrate, who took her confession on oath, and the confession was not allowed to be given in evidence because it was taken on oath. So, in the case of *Rex v. Smith and Hornage*, 1 Stark. N. P. C. 242, where the confession of a prisoner purported to have been taken on oath, Mr. Justice LE BLANC not only would not allow it to be given in evidence, but would not allow evidence to be given to show that the confession was, in fact, not taken on oath. The voluntary admission of a person is receivable in evidence against him, but evidence of an admission is not receivable where it has been extorted from the person making it, as it is by proceedings in Chancery, where the party is called on to answer under peril of imprisonment. Where is the difference between extorting a confession from a prisoner by threats, and extorting an admission from a party by the powers of the Court of Chancery? It has been the consistent practice of the criminal law to exclude all that is said by a prisoner after either threats or promises.

Whuteley, on the same side.—There is a clear distinction established between civil and criminal cases.

LORD DENMAN, C. J.—What is evidence in the one case is in the other.

**Whuteley*.—The distinction has been acted upon in a great number of cases. In a criminal case, a confession to be receivable in evidence must be voluntary, but the affidavit of a person, no matter how he may have been induced to make it, is receivable against him in a civil case. [*660

LORD DENMAN, C. J.—And in a criminal case.

Whuteley.—In the case of *Rex v. Lewis*, 6 C. & P. 161, (a) where the prisoner was examined on oath before a magistrate as to a case of poisoning, when there was no specific charge against any one, but where, at the end of the examination, the prisoner was committed for trial for the offence,

(a) In that case Baron Gurney said, "I remember, in a case of *Rex v. Walker*, which was a case of forging a will, I gave in evidence an affidavit made by one of the prisoners in the suit in Doctors' Commons, and the prisoner was convicted and executed."

Baron GURNEY would not receive in evidence on the trial her deposition taken on oath.

Cockburn, for the defendant Goldshede.—From the cases of *Rex v. Rivers*, 7 C. & P. 177, and *Regina v. Pikesley*, 9 C. & P. 124, it appears that, if the statement of an accused person only *purports* to have been taken on oath, it is not receivable in evidence against him. In the case of *Rex v. Merceron*, 2 Stark. N. P. C. 366, the evidence which the defendant gave, under the compulsory process of the House of Commons, was received in evidence against him, but when that case was cited by Sir W. *Follett*, in *Gilham's case*, Moo. C. C. 203, Lord TENTERDEN said, "I think there must be some mistake in that case; the evidence must have been given without oath, and before a committee of inquiry, where the witness would not be bound to answer." (a) *But the nearest case *661] to the present is that of *Regina v. Britton*, 1 M. & Rob. 297, (b) which was an indictment against a bankrupt for concealing his effects. It was there proposed to prove the petitioning creditor's debt by putting in the bankrupt's balance-sheet delivered in upon oath, and Baron ALDERSON and Mr. Justice PATTERSON held that the bankrupt's balance-sheet was not receivable in evidence for this purpose.

E. James, on the same side.—It appears from Mr. Starkie's work on Evidence, title *Admissions*, that many of the rules as to the non-reception of admissions in evidence apply to criminal cases only.

Phinn, on the same side.—In the case of *Regina v. Wheeley*, 8 C. & P. 250, Baron ALDERSON rejected the statement of a prisoner which purported to have been taken on oath.

Lord DENMAN, C. J.—This objection is wholly groundless. It is very unusual to give answers in Chancery in evidence, and I certainly do not recollect it to have been often done, but I remember that in Lord TENTERDEN's time there was a case at Guildhall in which Lord BROUGHAM and I put in an answer in Chancery, and asked the jury if they believed one word of it. No person ever thought of objecting to an answer in Chancery being evidence against the person making it, and it would be most extraordinary if such an objection could prevail, when the very oath on which an answer in Chancery is given is the foundation of those indictments for perjury which we are trying almost daily.

The defendant's answers in Chancery were read in evidence, but there being no evidence that the defendant Sidney knew that the bill of exchange *662] for £275, mentioned *in the indictment, was given in satisfaction of the bill of exchange for £250,

Lord DENMAN, C. J., suggested to the counsel for the prosecution, that the case should proceed no further, and this suggestion was acceded to.

Verdict—Not guilty.

Thesiger, S. G., *Humfrey*, and *Swann*, for the prosecution.

Cockburne, *E. James*, and *Phinn*, for the defendant Goldshede.

Platt and *Whateley*, for the defendant Sidney.

(a) Mr. Merceron had given evidence before a committee of the House of Commons appointed for the purpose of inquiring into the police of the metropolis.

(b) See also the case of *Regina v. Owen*, 9 C. & P. 238, and the authorities there referred to.

Sittings at Westminster after Hilary Term, 1845.

BEFORE LORD DENMAN, C. J.

WISE v. WILSON.

A person has a right to dismiss a *servant* for misconduct, but has no right to turn away an *apprentice* because he misbehaves; but the case of a young man seventeen years old, who, under a written agreement not under seal, is placed with a surgeon, as "*pupil and assistant*," and with whom a premium is paid, is a case between that of apprenticeship and service; and if such a person on some occasions come home intoxicated, this *alone* will not justify the surgeon in dismissing him. But if the "*pupil and assistant*," by employing the shop-boy to compound the medicines, occasion real danger to the surgeon's practice, this would justify the surgeon in dismissing him. In assumpsit for wrongfully dismissing a "*pupil and assistant*" to a surgeon, the defendant pleaded that the "*pupil and assistant*" so misconducted himself as to make it necessary to dismiss him to prevent his ruining the defendant's practice, and the plaintiff replied *de injuriâ*;—*Held*, that, on these pleadings, the plaintiff was entitled to begin.

ASSUMPSIT.—The declaration stated, that on the 10th of November, 1842, by a certain agreement made between the plaintiff, of the one part, and the defendant, of the other part, the defendant, who was then practising as a surgeon, agreed to receive into his house one George Wise, *then aged seventeen years, son of the plaintiff, "as pupil and assistant of the defendant, on the following terms and conditions, that is [*663 to say,—1st, That the defendant should afford board and lodging to the said George Wise (his washing excepted) from thenceforth to the expiration of three years, computed from the 1st day of November, in the year of our Lord 1842. 2dly, That the duties of the said George Wise should be to compound, prepare, and dispense the medicines he should be desired so to do by the defendant; and that he the said George Wise should keep the books connected with the said profession, attend to the night-bell, and visit a patient or patients when so requested by the defendant, during the aforesaid three years. 3dly, That he the said George Wise should be allowed time to attend such lectures during the sessions in the aforesaid period as might enable him to proceed with his studies, but that the number of such classes or lectures, and hours of attending the same, should be regulated by and meet with the defendant's approval, so that the defendant might not be seriously inconvenienced, or deprived of the said George Wise's services as assistant, during the aforesaid period of three years. 4thly, That the said George Wise should not waste his time while out attending such lectures or classes, but return immediately to the assistance of the defendant after the lecture was concluded, and that all further relaxations and leave of absence should have been asked and granted from the defendant, and that the said George Wise, while living with the defendant, during the aforesaid three years, should conform to all the defendant's rules and injunctions. And it was thereby further agreed and declared, that, the aforesaid stipulations being complied with, he the defendant further agreed not only to provide the said George Wise with a comfortable home during the aforesaid period, as stipulated, but to superintend and assist him the said George Wise in his studies, and to instruct him the said George Wise to the best of his the defendant's power, in the general practice *of medicine, such as the defendant then practised. And it was there- [*664

by further agreed and declared, that, upon the payment of £50 by the plaintiff to the defendant, the defendant did thereby faithfully pledge himself to fulfil each of the foregoing promises on his the defendant's part, and the plaintiff did thereby promise and agree to the aforesaid stipulations on her the plaintiff's part, and on the part of the said George Wise, for the full period of three years, ending on the 1st day of November, in the year of our Lord 1845; and the said defendant did further promise and agree, that, in reference to the particulars contained in the said clause hereinbefore set forth as the 3d, and commencing with the word 'thirdly,' and ending at the word 'fourthly,' he the defendant should not prevent the said George Wise attending the absolutely necessary lectures required by the College of Surgeons and the Apothecaries' Hall; which said agreement being so made as aforesaid, thereupon, to wit, on the day and year first aforesaid, in consideration that the plaintiff, at the request of the defendant, promised the defendant that the said agreement should be performed and fulfilled in all things on the part and behalf of the plaintiff and the said George Wise respectively, to be performed and fulfilled, he the defendant promised the plaintiff to perform and fulfil the said agreement in all things on his the defendant's part and behalf to be performed and fulfilled." The declaration then went on to state, that, at the time of the making of the agreement, the plaintiff paid to the defendant the sum of £50, and that the defendant did receive George Wise into his house on the terms and conditions aforesaid, and, until the breach of promise hereafter mentioned, did afford him board and lodging, (washing excepted,) and that, till the breach, the plaintiff and George Wise fulfilled their part of the agreement; and that George Wise was willing to have board and lodging, (washing excepted,) and requested the defendant to afford it to him. Yet the defendant, after the making of the *promise and the payment of the sum *665] of £50, and before the expiration of the three years, from the 1st of November, 1842, did not afford George Wise board and lodging, (washing excepted,) but refused so to do.

Plea—that the said George Wise misconducted himself as such pupil and assistant, and refused to obey the lawful commands of the defendant, absented himself from his duties, and became and was drunk and inebriated, and was, for the cause aforesaid, incapable of performing his duties as such pupil and assistant, and wilfully omitted to dispense medicines and send them out to the defendant's patients, and thereby greatly endangered the health and lives of the said patients, and neglected to keep the defendant's books and visit his patients, by means of which conduct the said George Wise became wholly useless as pupil and assistant of the defendant, and it became necessary, in order to prevent the said improper conduct wholly ruining the practice of the defendant, for the defendant to dismiss the said George Wise from his the defendant's employ, as such pupil and assistant, wherefore the defendant dismissed him.(a)

(a) The plea was in the following form:—

"That, at the time of the making of the agreement and promise of the defendant in the declaration mentioned, and thence hitherto, the defendant exercised and carried on the profession and business of a surgeon. That, after the making of the said promise and agreement in the said declaration mentioned, and before the breach of the said agreement and promise in the said declaration mentioned and assigned, to wit, on the 1st day of January, in the year of our Lord 1844, and on divers other days and times between that day and the said breach of the said agreement and promise in the said declaration mentioned and assigned, the said George Wise wrongfully, and contrary to the terms and conditions of the said agreement and promise of the plaintiff and the

*Replication de injuriâ.

C. Saunders, for the plaintiff, having opened the pleadings,

l'666

**Cockburn*, for the defendant, claimed the right to begin, as the agreement, as stated in the declaration, and the breach of it were both admitted by the plea. l'667

Lord DENMAN, C. J.—I have no doubt whatever that the plaintiff has a right to lay her case before the jury to show what her grievance is. It was the constant practice in Lord TENTERDEN's time.

It was opened by *Crowder*, for the plaintiff, that George Wise, the son of the plaintiff, being intended for a surgeon, and having studied under his uncle, in the country, was placed by his mother, the plaintiff, with the defendant, who was a surgeon in London, to whom he was to act as an assistant for three years; the defendant stipulating, in return, to assist him in

said George Wise, misbehaved and misconducted himself as such pupil and assistant as in the said declaration mentioned; and then, to wit, on the days and times aforesaid, wilfully omitted and refused to obey the just and lawful commands and orders of the defendant to him the said George Wise then given; and then, to wit, on the days and times aforesaid, without the leave or license of the defendant, and against his will, absented himself from his duties as such pupil and assistant for divers long and unreasonable spaces of time, to wit, for the space of six hours on each of the days and times aforesaid, (his said absence then not being for the purpose of attending the said lectures in the said agreement mentioned,) to the great inconvenience and deprivation to the defendant of the services of the said George Wise; and then, to wit, on the days and times aforesaid, voluntarily and wilfully became and was drunk and inebriated with beer, wines, spirits, and other intoxicating liquors, and then, to wit, on the days and times aforesaid, became and was, for the cause last aforesaid, wholly unfit to and incapable of performing his duties as such pupil and assistant; and then, to wit, on the days and times aforesaid, wilfully omitted and neglected to compound, prepare, dispense, and send out divers medicines, which he the said George Wise, as such pupil and assistant, was then by the defendant ordered and directed to compound, prepare, dispense, and send out to divers patients of him the defendant, and thereby greatly endangered the health and lives of the said patients.

"That, although there then were, to wit, on the days and times aforesaid, divers, to wit, five books connected with the said profession, which it was the duty of the said George Wise, as such pupil and assistant, to keep, and although the said George Wise then, to wit, on the days and times aforesaid, was ordered by the defendant to keep the same, yet the said George Wise did not, nor would, then properly or sufficiently keep the books connected with the profession of the defendant; but then, to wit, on the days and times aforesaid, wholly and wilfully omitted and neglected so to do. That, although there then were, to wit, on each of the days and times aforesaid, divers, to wit, five patients of him the defendant, which it then was the duty of the said George Wise, as such pupil and assistant, to visit, and although he the said George Wise then, to wit, on the days and times aforesaid, was then, to wit, on the days and times aforesaid, ordered by the defendant to visit the said patients, yet the said George Wise did not nor would visit the said last-mentioned patients of the defendant, as he the said George Wise was bound to do in and by the agreement in the said declaration mentioned, but then, to wit, on the days and times aforesaid, wholly and wilfully omitted and neglected so to do, by means of which said improper conduct and misbehaviour of the said George Wise, he the said George Wise became and was wholly useless as pupil and assistant to the defendant, and it then became and was necessary, in order to prevent the said improper conduct and misbehaviour damaging and wholly ruining the said practice and business of the defendant, for the defendant to dismiss the said George Wise from his the defendant's service and employ as such pupil and assistant; and the said business and practice of the defendant, but for the dismissal of him the said George Wise, would have been and become, by and through the misbehaviour and improper conduct of the said George Wise, greatly damaged, injured, and destroyed; wherefore the defendant, at the time of the breach of the said agreement and promise of the defendant in the said declaration mentioned and assigned, to wit, on the said 28th day of September, in the year of our Lord 1844, dismissed and discharged the said George Wise from his said service and employ, and thence hitherto refused and declined to afford to the said George Wise board and lodging as in the said declaration alleged, as it was lawful for him to do for the cause aforesaid, and this the defendant is ready to verify, &c.

(Signed) JOHN WILLIAM SMITH."

by further agreed and declared, that, upon the payment of £50 by the plaintiff to the defendant, the defendant did thereby faithfully pledge himself to fulfil each of the foregoing promises on his the defendant's part, and the plaintiff did thereby promise and agree to 'he aforesaid stipulations on her the plaintiff's part, and on the part of the said George Wise, for the full period of three years, ending on the 1st day of November, in the year of our Lord 1845; and the said defendant did further promise and agree, that, in reference to the particulars contained in the said clause hereinbefore set forth as the 3d, and commencing with the word 'thirdly,' and ending at the word 'fourthly,' he the defendant should not prevent the said George Wise attending the absolutely necessary lectures required by the College of Surgeons and the Apothecaries' Hall; which said agreement being so made as aforesaid, thereupon, to wit, on the day and year first aforesaid, in consideration that the plaintiff, at the request of the defendant, promised the defendant that the said agreement should be performed and fulfilled in all things on the part and behalf of the plaintiff and the said George Wise respectively, to be performed and fulfilled, he the defendant promised the plaintiff to perform and fulfil the said agreement in all things on his the defendant's part and behalf to be performed and fulfilled." The declaration then went on to state, that, at the time of the making of the agreement, the plaintiff paid to the defendant the sum of £50, and that the defendant did receive George Wise into his house on the terms and conditions aforesaid, and, until the breach of promise hereafter mentioned, did afford him board and lodging, (washing excepted,) and that, till the breach, the plaintiff and George Wise fulfilled their part of the agreement; and that George Wise was willing to have board and lodging, (washing excepted,) and requested the defendant to afford it to him. Yet the defendant, after the making of the *promise and the payment of the sum *665] of £50, and before the expiration of the three years, from the 1st of November, 1842, did not afford George Wise board and lodging, (washing excepted,) but refused so to do.

Plea—that the said George Wise misconducted himself as such pupil and assistant, and refused to obey the lawful commands of the defendant, absented himself from his duties, and became and was drunk and inebriated, and was, for the cause aforesaid, incapable of performing his duties as such pupil and assistant, and wilfully omitted to dispense medicines and send them out to the defendant's patients, and thereby greatly endangered the health and lives of the said patients, and neglected to keep the defendant's books and visit his patients, by means of which conduct the said George Wise became wholly useless as pupil and assistant of the defendant, and it became necessary, in order to prevent the said improper conduct wholly ruining the practice of the defendant, for the defendant to dismiss the said George Wise from his the defendant's employ, as such pupil and assistant, wherefore the defendant dismissed him.(a)

(a) The plea was in the following form:—

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said George Wise, misbehaved and misconducted himself as such pupil and assistant as in the said declaration mentioned; and then, to wit, on the days and times aforesaid, wilfully omitted and refused to obey the just and lawful commands and orders of the defendant to him the said George Wise then given; and then, to wit, on the days and times aforesaid, without the leave or license of the defendant, and against his will, absented himself from his duties as such pupil and assistant for divers long and unreasonable spaces of time, to wit, for the space of six hours on each of the days and times aforesaid, (his said absence then not being for the purpose of attending the said lectures in the said agreement mentioned,) to the great inconvenience and deprivation to the defendant of the services of the said George Wise; and then, to wit, on the days and times aforesaid, voluntarily and wilfully became and was drunk and inebriated with beer, wines, spirits, and other intoxicating liquors, and then, to wit, on the days and times aforesaid, became and was, for the cause last aforesaid, wholly unfit to and incapable of performing his duties as such pupil and assistant; and then, to wit, on the days and times aforesaid, wilfully omitted and neglected to compound, prepare, dispense, and send out divers medicines, which he the said George Wise, as such pupil and assistant, was then by the defendant ordered and directed to compound, prepare, dispense, and send out to divers patients of him the defendant, and thereby greatly endangered the health and lives of the said patients.

"That, although there then were, to wit, on the days and times aforesaid, divers, to wit, five books connected with the said profession, which it was the duty of the said George Wise, as such pupil and assistant, to keep, and although the said George Wise then, to wit, on the days and times aforesaid, was ordered by the defendant to keep the same, yet the said George Wise did not, nor would, then properly or sufficiently keep the books connected with the profession of the defendant; but then, to wit, on the days and times aforesaid, wholly and wilfully omitted and neglected so to do. That, although there then were, to wit, on each of the days and times aforesaid, divers, to wit, five patients of him the defendant, which it then was the duty of the said George Wise, as such pupil and assistant, to visit, and although he the said George Wise then, to wit, on the days and times aforesaid, was then, to wit, on the days and times aforesaid, ordered by the defendant to visit the said patients, yet the said George Wise did not nor would visit the said last-mentioned patients of the defendant, as he the said George Wise was bound to do in and by the agreement in the said declaration mentioned, but then, to wit, on the days and times aforesaid, wholly and wilfully omitted and neglected so to do, by means of which said improper conduct and misbehaviour of the said George Wise, he the said George Wise became and was wholly useless as pupil and assistant to the defendant, and it then became and was necessary, in order to prevent the said improper conduct and misbehaviour damaging and wholly ruining the said practice and business of the defendant, for the defendant to dismiss the said George Wise from his the defendant's service and employ as such pupil and assistant; and the said business and practice of the defendant, but for the dismissal of him the said George Wise, would have been and become, by and through the misbehaviour and improper conduct of the said George Wise, greatly damaged, injured, and destroyed; wherefore the defendant, at the time of the breach of the said agreement and promise of the defendant in the said declaration mentioned and assigned, to wit, on the said 28th day of September, in the year of our Lord 1844, dismissed and discharged the said George Wise from his said service and employ, and thence hitherto refused and declined to afford to the said George Wise board and lodging as in the said declaration alleged, as it was lawful for him to do for the cause aforesaid, and this the defendant is ready to verify, &c.

(Signed) JOHN WILLIAM SMITH."

his studies, to allow him to attend lectures, and to provide him with board and lodging, (washing excepted;) and for this the mother of the plaintiff paid the defendant a premium of £50. This arrangement was entered into in November, 1842, and on the 28th of September, 1844, the defendant would not allow the plaintiff's son to return to his house. The defendant, by his plea, had charged the plaintiff's son with almost every possible breach of his duty in respect of this agreement, but he submitted that, if all the allegations in the plea were true, they were no ground for a breach of the defendant's agreement by the dismissal of the plaintiff's son, and that the defendant could not put an end to the contract, but must resort to a cross action; as, in the case of *Winstone v. Linn*, 1 B. and C. 460, and 2 D. & R. 465, it was expressly held, that disobedience of orders or other acts of misconduct by an apprentice would not entitle the master to put an end to the contract of apprenticeship; and Mr. Justice BAYLEY there said, "The cases which have been referred to in argument, arising out of the relation of master and servant, do not apply to the present. In the case of apprentices, a premium is usually given, in consideration of which the master expressly contracts to instruct and maintain the apprentice during a given term. The premium is a consideration for the instruction and maintenance during the entire term. Where the ordinary relation of master and servant subsists, it is a condition implied, from the very nature of the contract, that the master should only maintain the servant so long as he continues to do his duty as servant, and the contract is to endure for a reasonable time if no specific time be fixed, and is determinable by reasonable notice." Mr. Justice HOLROYD also founded his opinion on the same grounds, and the court held that the covenants in an indenture of apprenticeship are not dependent, but mutual and independent, entitling each party to his remedy for a breach of them.

It appeared from the evidence of the plaintiff's son that he had been apprenticed to Dr. White of Tetbury, and that in November, 1842, he came to the defendant's house, and that all the time he was with the defendant he was a student at St. George's Hospital, and part of the time a dresser there.

*669] Evidence was given on the part of the defendant that the plaintiff's son was drunk about five times while he was at the defendant's, and that, on some occasions, in consequence of the plaintiff's son coming in late, he desired the shop-boy to make up the medicines, which the shop-boy accordingly did, and the plaintiff's son wrote the labels on them; but it appeared that when the defendant dismissed the plaintiff's son on the 28th of September, 1844, the latter had been attending a lecture at St. George's hospital, and on his return the defendant refused to admit him into his house, the plaintiff's son being then perfectly sober.

Lord DENMAN, C. J., (in summing up.)—There is a great distinction between a contract of apprenticeship, and a contract with a servant. A person has a right to dismiss a servant for misconduct, but has no right to turn away an apprentice because he misbehaves. This is a mixed case, something between that of apprenticeship and service. The plaintiff's son goes to the defendant to render assistance to him in his business, although he is also to pursue his studies; and, as a justification of his dismissal, the defendant has pleaded, not that the plaintiff's son did not perform all things on his part to be performed, but that he did things injurious to the defendant's practice, and so misconducted himself as to be

dangerous to the defendant's practice as a surgeon. It is proved beyond all doubt that on some occasions the plaintiff's son came to the defendant's house intoxicated, but I think that that alone would not justify the defendant in dismissing him. It is also proved, that, on several occasions, in consequence of the plaintiff's son coming home late, he could not compound the medicines, and employed the shop-boy to do it. Now, I think this affords matter for serious consideration, and if you think that, from this conduct of the plaintiff's son, real danger was occasioned to his master's business, you ought to find your verdict for the defendant, as the *defendant was then, in my opinion, justified in dismissing him.

Verdict for the plaintiff; damages £16. [*670

Crowder and C. Saunders, for the plaintiff.

Cockburn, J. W. Smith, and G. M. Dowdeswell, for the defendant.

REGINA v. DOUGLAS.

An information was filed by the attorney-general, under the stat. 33 Geo. 3, c. 52, s. 62, against an officer of the East India Company, for receiving gifts in India. A mandamus was granted under the stat. 13 Geo. 3, c. 63, s. 40, for the examination of witnesses in the Supreme Court at Madras. One of the witnesses there gave in evidence certain original accounts, copies of which were returned to the Court of Queen's Bench by the Supreme Court of Madras, with the examinations:—*Held*, that on the trial of the information in the Court of Queen's Bench, these copies were not receivable in evidence, and that the Court of Madras should have transmitted the original accounts to the Court of Queen's Bench.

INFORMATION filed by her majesty's attorney-general, on the stat. 33 Geo. 3, c. 52, s. 62, (a) against the defendant, for having received money as a gift, he being a British subject, holding office under the East India Company, in the East Indies. In one set of counts the defendant was charged with having received money as gifts from the Rajah of Tanjore, and, in another set of counts, from the Rajah of Poodoocottah. In another set of counts, the gifts were alleged to have been received from the *ministers of those princes and other courts, and in other counts the money [*671 was stated to have been received "under colour of being a gift."

Plea—Not guilty. (b)

On the part of the prosecution, several of the witnesses were examined before the supreme court at Madras, by virtue of a mandamus granted under the stat. 13 Geo. 3, c. 63, s. 40; and one of the witnesses, Rham Nad Bhutt, a native merchant at Madras, produced and gave in evidence, at the supreme court of Madras, his books of account, which contained entries of some of the payments which were the subject of the information. Copies of the entries in these books were returned to the Court of Queen's Bench by the supreme court of Madras, together with the depositions of the witnesses.

(a) By which it is enacted, "that the demanding or receiving any sum of money, or other valuable thing, as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for, or pretended to be for, the use of the said company, or of any other person whatsoever, by any British subject, holding or exercising any office or employment under his majesty, or the said united company, in the East Indies, shall be deemed and taken to be extortion and a misdemeanor at law, and shall be proceeded against and punished as such, under and by virtue of this act, and the offender shall also forfeit to the king's majesty, his heirs and successors, the whole gift or present so received, or the full value thereof."

(b) As to the trial of such cases in the Court of Queen's Bench, and as to the venue, see the stat. 13 Geo. 3, c. 63 s. 39.

Kelly, for the defendant.—I submit that copies of Rham Nad Bhutt's books cannot be received in evidence against the present defendant.

Lord DENMAN, C. J.—If these were copies of the defendant's own accounts they would not be evidence.

Thesiger, S. G.—I apprehend that copies are receivable where circumstances prevent the production of the originals. We have no power to compel Rham Nad Bhutt to give up his books for them to be brought here. In the case of *Alivon v. Furnival*, 1 C. M. & R. 277, in an action brought by the syndics of a French bankrupt upon an arbitral sentence and ordonnance, whereby the defendant was adjudged to pay the bankrupt a sum of money, it was held that the agreement of reference made in France was sufficiently proved by an examined copy, and the evidence of the attesting *672] witness, it appearing that the original was *deposited with a notary at Paris for safe custody; and, it being also proved by M. Colin, a French advocate, that it is the established usage in France, though it was not a provision of the written law, not to allow the removal of a document so deposited.

Lord DENMAN, C. J.—I think that the evidence is not receivable. The case of *Alivon v. Furnival* is not an authority for its reception, as it was there expressly proved that the French law prevented the removal of the document. Here it was in the power of the court, which was for this purpose a branch of the Court of Queen's Bench, to take possession of the document, and the court in India should not withhold the original document, but is bound to send all the evidence to this court.

The evidence was rejected.

Verdict—Guilty, with leave to move to enter a verdict for the defendant.

Thesiger, S. G., Sir *T. Wilde*, *Wigram*, *Clarkson*, *W. F. Pollock*, and *Forsyth*, for the prosecution.

Kelly and *Peacock*, for the defendant.

In the ensuing term, *Kelly* moved, in pursuance of the leave given, to enter a verdict for the defendant, and the court granted a rule to show cause.

*COURT OF EXCHEQUER.

[*673]

First Sitting at Westminster in Hilary Term, 1845.

BEFORE BARON ROLFE.

WHITE v. SPETTIGUE.

Books were stolen from A. which were afterwards bought by B., who did not know that they were stolen:—*Held*, that A. might maintain trover for them against B., although A. had taken no steps towards bringing the thief to justice.

TROVER for books.—Pleas, 1st, Not guilty; and, 2d, Not possessed.

It appeared, from the evidence of Mr. Mote, that the plaintiff had missed several volumes of the Statutes at Large, and that the witness saw two of the volumes in the window of the defendant's shop, at No. 67, Chancery-lane, where the defendant carried on the trade of a bookseller. It was further proved by this witness, that, on the plaintiff and the witness asking the defendant how he came by them, he at once stated that he had bought them of a young man seventeen or eighteen years old; and the defendant also produced another volume of the Statutes at Large, which he had also bought of the same person.—All the three books were proved to be the property of the plaintiff, and the defendant refused to give them up, unless the plaintiff would repay him what he gave for them, which plaintiff would not consent to do. It further appeared that the plaintiff had had an articled clerk, named Williams, and it was admitted that the plaintiff had not prosecuted his clerk Williams. It was also admitted that before the commencement of the present action the defendant had sold the books, and that his shop was not within the city of London.

**Merewether*, for the defendant.—I submit that the plaintiff is not entitled to recover in this action. In the case of *Gimson v. Wood*—[*674 *full*, 2 C. & P. 41, it was held, by Lord Chief Justice BEST, that if a party has good reason to believe that his goods have been stolen, he cannot maintain trover against the person who bought them of the supposed thief, unless he has done every thing in his power to bring the thief to justice. Here, the plaintiff has taken no step whatever in order to prosecute the thief.

ROLFE.—It appears that the plaintiff had a clerk of the name of Williams, but there is no evidence that he stole the books. It is proved that the defendant said that they were sold to him by a person of the age of seventeen or eighteen, but we have no evidence even that Williams was a person of that age.

**Merewether*.—The thief, in this case, has not been prosecuted, and the plaintiff does not appear to have taken any step towards prosecuting him. In the case of *Stone v. Marsh*, 6 B. & C. 551, money was recovered from the partners of Mr. Fautleroy, which were the proceeds of sales of stock obtained by him on forged powers of attorney; but there, although Mr. Fautleroy was not prosecuted for the particular forgery, which was the subject of that case, he had been executed on another charge of the same

kind, and the prosecution was, therefore, impossible; and, in the case of *Peer v. Humphrey*, 2 A. & E. 495, property feloniously taken from the plaintiff was sold by the felon to the defendant, who purchased bonâ fide, but not in market overt; the plaintiff gave notice of the felony to the defendant, who afterwards sold the property in market overt, after which the plaintiff prosecuted the felon to conviction, and it was held that the plaintiff might recover from the defendant the value of the property in trover, but then the plaintiff had *entitled himself to sue by having *675] prosecuted the thief to conviction.

Jervis.—In the case of *Marsh v. Keating*, (in error,) 1 Bing. N. C. 198, (a) it was held that a stockholder, when stock had been sold without his knowledge, under a forged power of attorney, might sustain an action for money had and received against persons who held the proceeds of the sale, but who had no privity or share in the felonious act.

ROLFE, B., (in summing up.)—If my goods be stolen, and the thief succeed in selling them, not in market overt, to a third person, I can recover them back by action against such third person; but, if one steals my goods, I cannot say to the thief I will forego the prosecution and take back the goods; but, if the thief has sold the goods, not in market overt, it never can be that the person who has bought them of the thief can hold the goods against the owner of them, merely because somebody else has committed a felony. If the defendant, in the present case, received the goods under *676] such circumstances, as to *be himself guilty of felony, and was a receiver of those books, knowing them to have been stolen, this action will not lie against him; but there is here not only no proof that the defendant knew the books to be stolen, but the evidence is all the other way, for it is proved that he put the books in his window, where the owner saw them as he walked along the street; that he at once stated how he had obtained them, and also produced another book that he had bought of the same person. With respect to the sale of the books to the defendant, I have no hesitation in saying that a selling in a shop not in the city of London is not a sale in market overt. In order to alter the property in stolen goods there must be a sale in market overt; and in the city of London a particular custom prevails, that every shop is market overt for the purposes of the trade carried on there. You will, therefore, have to say, whether you are satisfied that the defendant received these books knowing them to be stolen. If you are so satisfied you will find for the defendant, otherwise for the plaintiff.

Verdict for the plaintiff.

Jervis and *Rose*, for the plaintiff.

Merevether, for the defendant.

(a) Mr. Justice Park there said, "It may be admitted that the civil remedy is in all cases suspended by a felony where the act complained of, which would otherwise have given a right of action to the plaintiff, is a felonious act. Upon this ground Mrs. Keating would have lost any right of action which she could otherwise have had against Fauntleroy for the wrongful sale of her stock without her authority, by reason of the felony committed by him, as the means of selling the stock; but this principle does not apply to the present case, upon two grounds—1st, None of the present defendants had any privity or share whatever in the felonious act. There is, therefore, no felony committed by them in which the civil right arising against them, supposing it to exist, can merge or be suspended; they are innocent third persons. And, 2dly, Fauntleroy, the person guilty of the forgery, had suffered the extreme penalty of the law before the action was brought; not, indeed, for the commission of this particular forgery, but for another of the same nature; and the present plaintiff having given to the Bank all the means in her power for prosecuting the felon, it became impossible, without any default in her, that he should be prosecuted and punished for this felony."

Before POLLOCK, C. B., PARKE, B., ALDERSON, B., and ROLFE, B.

Merevether applied for a rule to show cause why there should not be a new trial, on the ground that the plaintiff was not entitled to recover in this action, as he had taken no step towards bringing the thief to justice.

*POLLOCK, C. B.—In the case of *Stone v. Marsh*, 6 B. & C. 564, [*677 I endeavoured to maintain the doctrine you are now contending for ; but, in that case, Lord TENTERDEN, C. J., said : “ There is indeed another rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action ; not that he shall not maintain a civil action to recover from a third and innocent person that which has been feloniously taken from him, for this he may do, if there has not been a sale in a market overt, but that he shall not sue the felon ; and it may be admitted that he shall not sue others together with the felon, in a proceeding to which the felon is a necessary party, and wherein his claim appears by his own showing to be founded on the felony of the defendant ; this is the whole extent of the rule.” The case of *Marsh v. Keating*, 1 Bing. N. C. 198, is also an authority against you, and that was decided in the House of Lords.

Merevether.—In those cases the felon had been convicted and executed.

PARKE, B.—You have neither pleadings to let in this defence nor facts to support it.

ALDERSON, B.—I think that you could not give a right of retainer in evidence under these pleadings ; but even if the plaintiff were not entitled to recover his property till he had prosecuted the thief, there is a conversion here by a sale of the books by the defendant.

POLLOCK, C. B.—The rule of public policy, by which a person is prevented from asserting a civil right in respect of which a felony has been committed, only applies to cases between the plaintiff and the felon, or where the felon is a necessary party, but not to cases where the action is *against a third person who is innocent of the felonious transaction. Besides that, the defence sought so to be set up in this case is not [*678 admissible under these pleas.

PARKE, B.—In the first place, there are no pleas to let in this defence. Secondly, there is also no evidence of the felony, it being perfectly consistent with the evidence that the books might have been taken by a person of unsound mind ; and, thirdly, the cases of *Stone v. Marsh* and *Marsh v. Keating*, are authorities to show that the rule, that a plaintiff must prosecute the person who has stolen his goods before he can bring an action to recover them, does not apply where the action is against a third party innocent of the felony. Those cases are subsequent to the case of *Gimson v. Woodfull*, 2 C. & P. 41.

ALDERSON, B.—The case decided by Lord Chief Justice BEST is overruled by the subsequent decisions. I think, also, that these pleas do not warrant the proposed defence ; however, assuming that, under a plea of not possessed, a lien might be given in evidence, (to which, perhaps, some difficulty might be raised,) still it would be open to the other side to show that the lien had ceased to exist at the time of the conversion. The utmost extent of the defence in this case is, that the defendant was entitled to retain possession of the books until the plaintiff had prosecuted the felon : and that right to retain (assuming it to have existed) must be at an end by the sale the same as a lien would be.

ROLFE, B.—I cannot agree to the law as laid down by Lord Chief Jus-

tice BEST, in the case of *Gimson v. Woodfull*, that a plaintiff is bound, on the first instance, to do his duty to the public by prosecuting, and that, if *679] actions like the one he was then trying could be maintained, there *would be no more criminal prosecutions. I think the true principle is that where a felony has been committed, which is also a civil injury to the party, that party shall not be permitted to seek redress for the civil injury, to the prejudice of public justice, and say, "I waive the felony and sue for the conversion." I also agree that the defendant has not pleaded so as to admit this defence. With respect to what I said at the trial, that if the defendant was a guilty receiver of the books, he would be entitled to the verdict, I must retract that and suspend my judgment on that point, as I entertain some doubt whether I was correct. Rule refused.

HAMILTON and JACKSON v. ASTON.

In an action on a promissory note, payable "to the executors of the late Mr. W. B.," the proper proof that the plaintiffs are the executors of Mr. W. B., is the production of the probate of his will, and the reading in evidence so much of it as shows that he appointed the plaintiffs his executors; and the giving in evidence the grant of administration (annexed to the probate) is not sufficient for this purpose.

DEBT.—The first count of the declaration stated that the defendant, on the 24th of January, 1842, made his promissory note, and thereby promised to pay to the plaintiffs 42*l.* 16*s.* 8*d.* on the 22d day of January, 1843, with lawful interest thereon. This count then went on to aver, that the sum of 5*l.* 16*s.* was due for interest on the note at five per cent. from the 25th of January, 1843, to the 25th of October, 1844. The declaration also contained a common count for interest, and a count upon an account stated. Pleas to the first count:—1st, That the defendant did not make the note; and, 2d, That the defendant made it for the accommodation of the plaintiffs, and without consideration. To the second count *nunquam indebitatus*. Replication to the second plea, *de injuria*.

It was opened by *Hugh Hill*, for the plaintiffs, that the plaintiffs were the executors of the late Mr. William Barton, to whom the defendant was indebted in the sum of 42*l.* 16*s.* 8*d.*, and that Mr. William Barton having *680] died on the 22d of January, the defendant was applied to "on the 24th of that month on the subject of the debt, when he gave the promissory note now sued on, which was in this form:—

"£42: 16: 8*d.*

"Birmingham, January 24th, 1842.

"I promise to pay to the executors of the late Mr. William Barton, or order, the sum of 42*l.* 16*s.* 8*d.* for value received, twelve months after his death, with lawful interest for the same.

(Signed) "WILLIAM ASTON," (the defendant.)

The date of Mr. Barton's death would be proved, and he proposed to read the grant of administration annexed to his will, to show that the present plaintiffs were his executors.

ROLFE, B.—That will not be enough; unless you also give the probate in evidence, to show that Mr. Barton appointed the plaintiffs his executors.

The defendant's signature to the note was proved; and it was also proved that Mr. William Barton died on the 22d of January, 1842, and

the probate of his will was put in and part of it read, to show that the plaintiffs were his executors.

Hugh Hill cited the case of *Megginson v. Harper*, 2 C. & M. 322.(a)

*ROFFE, B.—The plaintiffs are entitled to a verdict.

Verdict for the plaintiffs, for 49l. 5s. 8d. [*681]

Hugh Hill, for the plaintiffs.

(a) In that case a testator had bequeathed to his two daughters £250 each, to be paid when they arrived at the age of twenty-one, and till that period the expenses of board, clothes, and education to be borne and paid by his executors. He appointed executors, and also trustees, with all necessary powers to fulfil the will. At a meeting of the trustees and executors, for the purpose of settling the testator's affairs, the executors paid over to the trustees, *inter alia*, the sum of £500, to be set apart for the payment of the legacies to the daughters when they attained the age of twenty-one. This sum was afterwards lent by the trustees to the defendant on a promissory note, by which the defendant promised "to pay to the trustees acting under the will of the late Mr. William Brigham, of Huggate Lodge, or their order, the sum of £500, for value received, with interest." It was held, that a part payment of principal and interest to one of the legatees within six years was sufficient to take the case out of the Statute of Limitations, and that the surviving trustee, the other being dead, had a right to maintain an action on the note; and Baron Bayley said, "The note on the face of it appears to be given to 'the trustees acting under the will of the late Mr. William Brigham,' which words call for explanation, as the payment is to be made to them in that capacity. You may then look at the will to see what the trusts are, and to what purpose the money is applicable, and you may give evidence to show in explanation that these legatees, Anne and Jane Brigham, were the persons from whom the trustees took the note."

In the case of *Cooke v. Colehan*, K. B., in error, 2 Str. 1217, it was held, that a note payable to A. or order, six weeks after the death of the defendant's father, was a promissory note, for there is no contingency, whereby it never may become payable, but it is only uncertain as to the time, which is the case of all bills payable also many days after sight. This decision confirmed that of the Court of Common Pleas, in the same case in which the judgment of L. C. J. Willes is reported, Willes, 393. But, in the case of *Brandesley v. Baldwin*, 2 Str. 1151, "a promissory note to pay money within so many days after the defendant should marry, was (on consideration) held not to be a negotiable note within the statute."

**Sittings at Westminster after Hilary Term, 1845.*

[*682]

BEFORE LORD CHIEF BARON POLLOCK.

MACHELL v. ELLIS.

The 4th and 19th sections of the stat. 5 & 6 Will. 4, c. 59, (for preventing cruelty to animals,) which require every person who shall impound or confine any cattle or animal in any enclosed place to supply it with food; and empower such person to sell the animal for the value of the food, and direct notice of action to be given to him, and the venue to be laid in the proper county, &c., do not apply to all cattle taken under all circumstances, but only to cattle or animals impounded or confined in cases where the distrainer had a right to distrain, or at least some colour for it.

The judge at a trial will not take the facts from the opening of the counsel on the opposite side; therefore, where it was essential to entitle the defendant to notice of action that cattle should have been distrained, the judge would not act on the opening of the plaintiff's counsel, who stated that the cattle were distrained.

A horse of the plaintiff was confined in the farm-yard of the defendant, at a farm at which he did not reside, and the defendant's farm bailiff, who resided at this farm, directed the horse to be sold at a neighbouring market; whether in trover this is evidence of a conversion by the defendant, *quære*.

TROVER for a colt. Pleas—1st, not guilty "by statute;" 2d, that the colt was on the defendant's land, damage feasant, and that he took it as a distress and impounded it.(a)

(a) The second plea was added, after the cause was in the paper, by order of the Lord Chief Baron, upon the terms of "the plaintiff being at liberty to give in evidence any answer to the pleas without altering the replication."

It was opened by *Jervis*, for the plaintiff, that the plaintiff had a right of common on Hainault forest, and, in exercise of that right, had turned on the forest a two-year-old entire colt; this colt had, by reason of the defective state of the defendant's fences, got into one of the defendant's fields, which was adjacent to the forest, and the colt was taken by the defendant as a distress damage feasant. The defendant took the colt, a stallion, and converted it into a gelding, and it was clear law, that, if a distress be misused by the distrainer, he became a trespasser ab initio. Even working a distress had been held to be a misuser, and so no doubt was the gelding of this colt.

It was proved, that the colt was turned on Hainault forest, in the county *683] of Essex, and evidence was given *that it was afterwards confined in the yard at the defendant's farm, at which the defendant did not reside, and that afterwards it was, by order of the defendant's bailiff, a person named Joy, who did reside there, sold by auction in Romford market for 5*l.* 12*s.* to a person named Wise. It further appeared, that, upon this sale, Wise had had the colt cut by a veterinary surgeon named Sparkes, but that the operation had been skilfully performed, and that the plaintiff had intended that this operation should have been performed on this colt about this time by the same veterinary surgeon.

It further appeared, that, after this, the colt was again in the possession of the plaintiff, and that it subsequently died, in consequence of inflammation brought on by cutting, which the veterinary surgeon stated would sometimes occur. There was no evidence to connect the defendant personally with any of the facts before stated, and there was no evidence of any distress, or of how or why the colt came to be put in the yard at the defendant's farm.

Wortley, for the defendant.—I submit, that there is no evidence of any conversion by the defendant. The colt is seen on the defendant's farm, at which he does not reside, and it is sold by order of his bailiff. This may be evidence of a conversion by the bailiff, but certainly none of a conversion by the master.

POLLOCK, C. B.—I will give you leave to move to enter a nonsuit on this point.

Wortley.—I have also to ask your lordship to direct a verdict to be entered for the defendant, under stat. 5 & 6 Will. 4, c. 59, ss. 4 and 19. By the former of those sections, "every person who shall impound *or confine*" any cattle or animal is required to provide it with sufficient food, and is at liberty, for the recovery of the value thereof, to sell the animal in *684] any public market, in the manner *there pointed out; and by the 19th section of the same statute, all actions for any thing done in pursuance of that act shall be brought in the proper county, and fourteen clear days' notice of action given, and if this is not done, a verdict is to be found for the defendant. Here the colt was taken damage feasant, and sold, or at least intended to be sold, under the 4th section of this act.

POLLOCK, C. B.—There is no evidence here that this colt was ever distrained.

Wortley.—Mr. *Jervis* so stated in his opening.

POLLOCK, C. B.—I cannot take the facts from the opening of counsel. The object of an opening is, to give the jury a general notion of what will be given in evidence, so as to enable them to understand the evidence when it is given.

Deedes, for the defendant.—The words of the 4th section of the stat

5 & 6 Will. 4, c. 59, are, "that *every person* who shall impound or *confine*, or cause to be impounded or *confined*, any horse, ass, or other cattle or *animal*, in any common pound, open pound, or close pound, or in *any enclosed place*, shall, and he hereby is required" to supply it with food. This colt, whether distrained or not, was certainly confined in an enclosed place; I submit, therefore, that the person causing it to be confined was bound by this act to supply it with food, and that the provisions of the 4th and 19th sections, therefore, apply.

POLLOCK, C. B.—Do you contend, that the word "confined" makes the statute apply to all takings, under all circumstances?

Deedes.—As the provisions were intended to prevent *cruelty to the animal, I apprehend, that there can be no doubt that such was [685 the intention of the legislature.(a)

POLLOCK, C. B.—I need not call on you, Mr. *Jervis*, to answer this objection. The argument of Mr. *Deedes* comes to this, that if a person confines another person's cattle, no matter why, and without any question of impounding, he is bound to supply food, and charge for it, and at seven days' end may sell the cattle. Any thing so foreign to all notions of justice it is hard to conceive; but I think that the latter words of the 4th section, which authorizes one justice of the peace, within whose jurisdiction such cattle or animal shall have been "so *impounded* and supplied with food," to enforce payment for it, and which authorizes the sale of the cattle "after the expiration of seven clear days from the time of *impounding* the same," show, that it applies to cases of impounding only; and to bring the case within this act of Parliament, it ought to be shown that the party had a right to distrain, or at least some colour for it.

Wortley addressed the jury for the defendant.

POLLOCK, C. B., in summing up, intimated that he thought that the plaintiff was entitled to a verdict, but that nominal damages would be sufficient, unless the jury thought that there had been some mistreatment of the colt. Verdict for the plaintiff; damages 5*l.* 12*s.*

Jervis and *Ogle*, for the plaintiff.

Wortley and *Deedes*, for the defendant.

(a) See the case of *Mason v. Newland*, 9 C. & P. 575.

**First Sitting in Trinity Term, 1845.*

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BEFORE BARON PARKE.

HARRIES v. EDMONDS.

By a charter-party it was stipulated that a ship should proceed to Limerick with her then present cargo, and there take a cargo of oats for London, at a freight of 2*s.* 8*d.* a quarter: six days being allowed for loading at Limerick. Before the expiration of the six days, the freighter's agent offered the captain a cargo at 2*s.* 6*d.*, and said, that the freighter's broker would pay the difference. The captain refused to take any thing not according to the terms of the charter-party:—*Held*, that, as the contract had not then been broken by the defendant, the captain was not bound to accept this offer; but that, if the contract had been broken by the freighter not putting any cargo on board within the six days, it would have been the captain's duty to have taken a cargo at the most he could get, so that the damages to be paid by the freighter should be reduced as much as possible.

ASSUMPSIT upon a charter-party.—The declaration stated, that by a charter-party made on the 5th day of October, 1843, between the plaintiff,

the owner of the ship *Gleaner*, and the defendant, it was agreed that the ship should proceed to Limerick with her then present cargo, and deliver it there, and then load about 1100 quarters of oats, and proceed therewith to London, or some port in the channel: six days were to be allowed for loading at Limerick, and the usual time for discharging in London, if the cargo of oats were discharged there, and fourteen days if the cargo were discharged in any port in the British Channel. Breach, that the defendant did not put any cargo on board at Limerick; 2d count, upon an account stated. Plea, a payment of £50 into Court, and that the plaintiff had sustained no greater damages. Replication, that the plaintiff had sustained greater damages.

It appeared that the ship *Gleaner* had proceeded with a cargo of coals to Limerick, and finished unloading them there on the 17th day of November, 1843. It was proved that the defendant did not put any cargo on board the *Gleaner* at Limerick; but it was also proved, that, on the 7th of November, Messrs. Mulock & Son, who acted for the plaintiff at Limerick, had offered Captain Harries, who was the captain of the *Gleaner*, a cargo of oats for London, at 2s. 6d. a quarter, and that, between the 6th and the *687] 15th of November, the captain said he would not take 2s. 6d. a quarter, but should lay his lay days, and proceed to London in ballast. It was further proved by Mr. Luke Mulock, that on the 7th of November, when he offered Captain Harries the cargo of oats, at 2s. 6d. a quarter, he told Captain Harries that Mr. Corneile, the defendant's broker at Limerick, would pay the difference between that amount and 2s. 8d.

PARKE, B.—The 2s. 6d. a quarter was offered before the lay days had expired; and if, before the lay days had expired, the captain had taken a freight at less than 2s. 8d., the defendant might have said that the captain had broken his contract. If this offer of 2s. 6d. had been made after the 23d, when the contract was broken by the defendant by his not putting a cargo on board within the six lay days, it would have been the captain's duty to have accepted it, to save the defendant from as much damage as he could.

It was further proved, that Captain Harries had had the offer of a cargo at 2s. 2d. a quarter; but that offer went off because the captain would not consent to wait at Cowes for orders.

PARKE, B.—That offer was clogged with a condition that he was not bound to comply with. He was not bound to wait at Cowes for orders. It would have been out of his way, though not much; still he was not bound to go out of his way at all.

It afterwards appeared, that the offer at 2s. 6d. had been made by Mr. Quinoran, subject to the approbation of his partner, who did not approve of it, and that the offer of a cargo at 2s. 2d. was made before the 23d of November. It was admitted that the plaintiff's ship had ultimately taken *688] a cargo of oats from Limerick to London at 1s. 9d. a quarter, and he was willing to allow that amount in reduction of his claim.

Crowder, for the defendant.—It is an unimportant question whether the plaintiff can claim damages, when he was offered a cargo at 2s. 6d., and payment of the difference.

PARKE, B.—The offer of the 2s. 6d. comes to nothing, as the proposal was only conditional on the assent of Mr. Quinoran's partner, who would not consent to it. The offer of the 2s. 2d. is clogged with the waiting for orders at Cowes. The contract was broken by the defendant on the 23d by his not putting a cargo on board within the six days. The plaintiff is

certainly entitled to damages, and the question is as to their amount. I think that the plaintiff is entitled to recover what the defendant ought to have paid *minus* what he might have got. I think that the captain was not bound to accept either of the proposals at the times they were made, as the defendant had six days to put the cargo on board, and the contract was not broken till after the six days, which was on the 23d of November.

Verdict for the plaintiff; damages, 54*l.* 2*s.* 6*d.* above the sum paid into Court.

Jervis and *Lush*, for the plaintiff.

Crowder and *F. V. Lee*, for the defendant.

*NORFOLK WINTER CIRCUIT, 1844. [*689

SUFFOLK ASSIZES.

BEFORE MR. JUSTICE WILLIAMS.

REGINA v. WILLIAM HOWELL, WALTER HOWELL and SHIPLEY.

A person, who was a Roman Catholic, was shot on the 29th of July, at between twelve and one A. M., and died at half-past nine, P. M., on the 30th. Almost immediately after being wounded, he said—"I am shot; I am dying;" and after that he continued in a desponding state, and said—"I will never get over this;" and between seven and eight hours before his death he took leave of a child, saying, "I shall never see you more." About three hours before his death, it was proposed to him that a priest should be fetched, to which he replied, "That is not of much use;" and on his then being asked to see a magistrate, he replied, "Not yet;" upon this he made a statement. It was proved by a Roman Catholic priest that, if a Roman Catholic wishes to make his peace with God, he usually sends for a priest to receive extreme unction, having previously made confession and received the communion, but that extreme unction is not deemed by the Roman Catholic Church essential to salvation.—*Held*, that the statement was receivable in evidence as a declaration in *articulo mortis*.

MURDER.—The indictment charged the prisoners with the wilful murder of James M'Fadden, by shooting him. The shooting was charged to have been on the 29th day of July, 1844, and the death of the deceased on the 30th.

It appeared that the deceased, who was a police constable, received his wound between twelve and one o'clock of the morning of Monday, the 29th of July, 1844, and died about half-past nine on the night of the next day (Tuesday the 30th.) It was proposed, on the part of the prosecution, to give in evidence statements made by the deceased between six and seven o'clock on the evening of Tuesday the 30th.

It was proved that the deceased, upon the night of Sunday, the 28th of July, 1844, was watching the barn of a *person named Mary But- [*690 ton, and that five men, including the three prisoners, came and broke into the barn, and were retreating with their booty, when the deceased fell

in with them, and was shot by a gun, which, by the medical testimony, must have been very near to him, and was loaded with shot above the ordinary size, which nearly went through his thigh, the wound being about the middle of the thigh, in front, and two shots (produced) having been extracted from the back part. The deceased fell instantly, and was never able to stand: he contrived, however, with great difficulty, to crawl from the spot to the house of the said Mary Button ("three or four minutes' walk") to give an alarm. Upon Mary Button appearing at the window, the deceased said—"I am shot; I am dying." Upon being helped into the house and laid upon a bed, he repeated several times that he was dying, according to the testimony of the same witness, and wished a doctor to be sent for. He was in very great pain, and complained much. Between one and two (Monday morning) Samuel Smith came, he being the first medical man who saw the deceased. His testimony was, "that the deceased was then in a weak, faint state; he was suffering very acutely; he spoke very little; he never rallied from that weak state."

The deceased was removed to his lodgings about a mile distant, and between four and five (Monday morning) his wound was dressed; about that time (the witness was not sure whether before or after) the deceased said—"O dear, doctor! I will never get over this." To which it did not appear that the doctor made any observation. This witness last saw the deceased between four and five on Monday afternoon, and his evidence as to that time was, "he was no better; I said very little to the deceased; he did not seem less *desponding*." The surgeon (John Prentice) who saw the deceased from time to time, till within an hour of his death, from between two and three of Monday morning, said, that, upon his first coming to him, he accosted him—"Mac, how are you?" deceased replied, "O doctor, I will *never get over this." The doctor endeavoured to cheer him, *691] and said, "Mac, I hope we shall see you out again." The deceased said nothing, but shook his head, and the witness added, that he did not seem at all cheered by the hope expressed. This witness having described the wound substantially, as above stated, added, "that he appeared to have received a severe shock to the nervous system, and that he never rallied from it." This witness further stated, that, upon his first visit, he stayed with the deceased two or three hours, and that, during the course of it (he could not say precisely when) the deceased again said, "O doctor, I will never get over this;" and added, that he seemed in a "*desponding* state." It appeared that this witness saw the deceased again between four and five of Monday afternoon, when "he was not materially worse," and then told him "that he hoped he would get better;" but added, that this remark "did not appear to raise him in cheerfulness." After this, though the witness continued to see the deceased till near his death, (as above mentioned,) he had no recollection of any thing said by him to deceased, or by deceased to him. About eleven on Tuesday morning he observed that fatal symptoms had come on, and had no hopes whatever of recovery; at that time part of his description of the deceased was, "that his spirits were much depressed."

The learned judge desired this witness to explain what he meant by the word "*desponding*," and, in answer to questions put by his lordship, the witness's answers were as follows:—"When I said, 'Mac, I hope we shall see you out again,' he shook his head in a very *desponding* way; I collected from it that he thought he should never rally again. This was my impression at the time." "From his speech and manner, the deceased

convinced me that he thought he should not recover. He was not a person of low spirits, but of firm mind."

This further evidence was given as to the state of mind of the deceased. Mary Julien, with whom the deceased *lodged, came into his room after the fatal symptoms had appeared, viz. about one on Tuesday [692 afternoon, when he said, "Mother, (so he used to call her,) I shall never be well more." To which she replied, "My dear, you have nothing to do but to pray to God to save your soul." She added that the deceased "said nothing to that, but seemed as if he was going to expire, as if he had not power to speak." About two o'clock on the same afternoon, Harriet Dean, the wife of an inspector of police, intimate with deceased, went to see him: she said, "he shook hands with me, and I said, 'O Mac, I am sorry to see this.'" He said, "Yes, Mrs., this will finish me." Whereupon an infant child of this witness, which had been left below stairs, was brought to the bedside, when the deceased took the child by the hand and said, "My dear little boy, I shall never see you more." James Lark, inspector of police, said that he saw the deceased between ten and twelve of the Tuesday, and found him "in a very weak state," but then had no conversation with him. He then added, that he saw deceased again in the first part of the afternoon (the time was not more nearly fixed) and had some conversation with him. The witness told him, "that he would be provided for, not only in the present case, but also, if he should be lame, for life." He said, "It's of no use, I sha'n't want it." What was said about providing for him did not appear to cheer him. This witness then proceeded as follows:—"Towards six or seven, (Tuesday,) I cannot speak positively, I helped him out of bed to make water; I gave him a chamber-pot, and he endeavoured to pass water; after severe pain and struggle he did, but it was chiefly blood. I *supposed* he saw it, because he made a motion to put the chamber-pot aside; he rested his head upon my shoulder, and said, 'It is all up with me.' I then lifted him into bed again." This witness added, that he said to the deceased, (in what part of the conversation did not distinctly appear,) "You are very severely wounded, and I believe mortally so." "He said nothing, but slightly grasped my hand." The witness then *proceeded thus:—"I waited a little time after [693 he got into bed (after making the bloody water as above stated) to let him recover himself, he having been hurried by getting up;" and then began the conversation which was proposed to be given in evidence as a declaration in *articulo mortis*. The witness said, "that the deceased was very serious at this time, and appeared to be sinking very fast; his manner was that of a man in a dying state. The conversation lasted till near seven o'clock." Soon after this was over, the same witness (Lark) proposed to fetch a priest, to which deceased replied, "*That's not of much use.*" Witness then said, "Have you any objection to make a deposition to a magistrate?" Deceased said, "No." Witness said, "Mr. Clark (a magistrate) is in the other room." Deceased said, "Not yet." It was not shown that deceased spoke after; "he then seemed very much suffering." The deceased was a Roman Catholic, and the Rev. Henry Bingham (a Catholic priest) gave the following evidence:—"If a Roman Catholic wishes to make his peace with God, he usually sends for a priest to receive extreme unction, having previously made confession and received the holy communion, if there be time. Except he be dead to all sense of religion, a person, thinking himself upon the point of death, would send for a priest. There are, of course, different degrees of seriousness and devotion in our

church as in every other, but people who may generally have neglected the ordinances, invariably send for a priest. Extreme unction is not deemed by our church necessary for salvation; but if a priest were at hand, and offered his services, and a person at the point of death refused them, I should say he was no Catholic, or not in the way of salvation. Attending Protestant places of worship, is considered to be a proof of a lax Catholic." It was proved, that the nearest place where a Catholic priest resided was fourteen or fifteen miles from where the deceased was lying; and that he *694] (deceased) had attended the parish church and an "Independent meeting at Hadleigh, more than once, there being a Roman Catholic chapel in the neighbourhood.

Prendergast and *O'Malley*, for the prisoners, objected that the statement made to the witness Lark was not receivable in evidence as a declaration *in articulo mortis*, as it did not appear that the deceased, at the time when he made it, was without hope of recovery, and in expectation of almost immediate dissolution; and that it appeared from his declining to have a priest sent for, and his reply of "Not yet" to the offer of seeing a magistrate showed, that the deceased did not consider himself a dying man.

WILLIAMS, J.—I shall receive the evidence, and reserve the point for the consideration of the judges.

The statement made by the deceased to the witness Lark was given in evidence, and it went to show that the prisoner William Howell had fired the shot by which the deceased was killed. Verdict—Guilty.

Gurdon, for the prosecution.

Prendergast and *O'Malley*, for the prisoners.

Before Lord DENMAN, C. J.; POLLOCK, C. B.; PARKE, B.; ALDERSON, B.; PATTESON, J.; WILLIAMS, J.; COLERIDGE, J.; COLTMAN, J.; MAULE, J.; ROLFE, B.; WIGHTMAN, J.; CRESSWELL, J.; and ERLE, J.

Prendergast, for the prisoners.—I submit that the statement made by the deceased was not receivable in evidence. The reception in evidence of *695] dying declarations is in all "cases contrary to the ordinary rules of evidence, and they are a remain of the loose kind of evidence which used to be received, and being so, the rules as to their reception ought rather to be restricted than enlarged. In Mr. Greaves's edition of Russell on Crimes, Vol. 2, p. 752, it is laid down, that "the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope in this world is gone, when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations, to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." For this principle *Woodcock's case*, 1 Leach, 500, is cited. It appears also from the authorities, that, to render a declaration of this kind admissible, it must be made not only under an apprehension of approaching death, but with an exclusion of all hope of recovery. In the present case, no medical man told the deceased that his recovery was hopeless.

CRESSWELL, J.—The man himself says, that he shall not get over it, and when the surgeon says that he hopes to see him about again, the man shakes his head.

Prendergast.—The expressions used by the deceased were such as fall

from many sick men who recover very soon. In the case of *Rex v. Van Butchell*, 3 C. & P. 629, it was held, that, in order to render a declaration of this kind admissible in evidence, it must have been made under an impression of "almost immediate dissolution," and that it was not enough, that the deceased should have thought that he should ultimately never recover. The deceased, in the present instance, was an Irishman, and Irishmen often use stronger expressions than the case will warrant. Soon *after he was shot, the deceased said, "I am dying; send for a doctor;" by which he meant, that he did not think he was dying, [*696 but only that he was much hurt; and the wish for a medical man to be sent for showed that he hoped to recover, and hoped that he should not die.

ALDERSON, B.—I think that you are putting it too strongly. A man might think he was dying, and yet might say, "Send for a doctor to try to diminish my pain."

Prendergast.—In the case of *Rex v. Spilsbury*, 7 C. & P. 187, it was laid down by Mr. Justice COLERIDGE, that, in cases of this kind, the judge would consider whether the conduct of the deceased was that of a dying person, such as, whether he gave directions as to his funeral, his will, and the like, and not merely the expressions he used as to whether he thought he should, or should not, recover. In the present case, if the deceased had thought he was really dying, there would have been some evidence of acts done, showing that he feared impending death. The deceased makes no allusion to his funeral, takes no steps towards disposing of his property, takes no farewell of his friends, and though he tells a child he shall never see him again, this is not at all equivalent to a man taking leave of his friends, when he feels that he is going to leave them for ever; and he, being a Roman Catholic, also declines to see a priest, and puts aside the proposal to make a statement to a magistrate, by the answer, "Not yet." Would a Roman Catholic, who thought that death was impending, refuse the assistance of a priest? Roman Catholics attach great importance to confession and absolution, and if the deceased had really thought that he had been dying, he would also have wished for the sacrament of extreme unction. With regard to the feelings of Roman Catholics *on this subject, I will cite a passage from the writings of the Right Rev. [*697 Dr. Challoner, (a) who, in treating of the sacrament of extreme unction, says:—"First, it remits sins, at least such as are venial, for mortal or deadly sins must be remitted before receiving extreme unction by the sacrament of penance and confession; secondly, it heals the soul of her infirmity and weakness, and a certain propensity to sin contracted by former sins, which are apt to remain in the soul as the unhappy relics of sin, and it helps to remove something of the debt of punishment due to past sins; thirdly, it imparts strength to the soul to bear more easily the illness of the body, and arms her against the attempts of her spiritual enemies; fourthly, if it be expedient for the good of the soul, it often restores the health of the body." However, the deceased was evidently clinging to the hope of life, and was unwilling to do any act which showed he was about to die; and, acting as he did, he could not have thought himself *in articulo mortis*.

ALDERSON, B.—I do not apprehend that it is necessary that the person should think himself *in articulo mortis*, if by that is meant that he should think that he was in the act of dying, which is what I understand by the phrase *in articulo mortis*.

Prendergast.—If a person had an injury of the lungs from which he thought he should not recover, yet, if he did not apprehend almost immediate dissolution, but thought he might live three or six months, his declarations would not be receivable in evidence.

ALDERSON, B.—In the case of *Rex v. Mosley*, 1 M. C. C. 97, the deceased said that he thought he should not live many days.

*698] *Prendergast*.—In the present case, the deceased did not *say that he expected to die in a few days, but that he should never get over it, and in *Mosley's case*, the deceased never wished for any medical assistance; and the cases I have cited are later than the decision in that case. In the case of *Regina v. Megson*, 9 C. & P. 418, the deceased said that she had been in hopes she should have got better, but, as she was getting worse, she thought it her duty to mention what had taken place; and there her declarations were rejected.

ROLFE, B.—In that case there had been a rape on the person of the deceased, and it was extremely doubtful whether she thought that she was dying, or even that she was very seriously injured.

Prendergast.—As the deceased, in the present case, did none of those acts which a dying man would do, postponed making a deposition before a magistrate, by his answer "Not yet," and refused the offices of his religion when they were proposed to him, I trust that your lordships will see that the deceased could not reconcile himself to death, and still clung to a hope of remaining in this world, and that his declaration therefore ought not to have been received in evidence.

LORD DENMAN, C. J.—Mr. *Gurdon*, we ought not to hear you. After the very learned and ingenious argument that has been addressed to us, we think that there is no ground for saying that this evidence was not receivable. There was danger, and the deceased was told so. And there is abundant evidence that he had no hope of recovery.

Gurdon, for the prosecution, was not heard.

The judges unanimously held the conviction right.

*699] *HOME SPRING CIRCUIT, 1845.

BEFORE LORD DENMAN, C. J., AND BARON ALDERSON.

MAIDSTONE ASSIZES.

BEFORE BARON ALDERSON.

REGINA v. EDWARD SPICER.

On the trial of an indictment for stealing "one sheep" some of the witnesses stated the animal to be a sheep, others a lamb. It was between nine and twelve months old, and the jury who convicted the prisoner found, that, in common parlance, according to the usual mode of describing such animals, it would be called a lamb. The fifteen judges held the conviction right, the word "sheep" being general.

SHEEP-STEALING.—The indictment was in the usual form, and charged the prisoner with stealing "one sheep," the property of Frankly Belsey, on the 6th of January, 1845.

It appeared from the evidence to be doubtful whether the animal taken was a sheep or a lamb. It was between nine and twelve months old, and some of the witnesses stated it to be a sheep, and others a lamb. It was clearly proved that the prisoner stole it.

Ballantine, for the prisoner, addressed the jury on the question whether it was a sheep or a lamb.

The jury found the prisoner guilty, and stated, in answer to questions put to them by ALDERSON, B., that, in common parlance, according to the usual mode of describing such animals in the country, it would be called a lamb.

ALDERSON, B., reserved the case for the opinion of the fifteen judges.

**Horn*, for the prosecution.

Ballantine, for the prisoner.

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In the ensuing term, the case was considered by the judges, who held the conviction right; the word "sheep" being general.

LEWES ASSIZES.

(*Crown Side.*)

BEFORE LORD DENMAN, C. J.

REGINA v. JAMES SMITH.

A forged paper was in the following form:—"To M. & Co. Pay to my order, two months after date, to Mr. J. S., the sum of £80, and deduct the same out of my account." It was not signed, but across it was written, "Accepted, Luke Lade;" and at the back the name and address of J. S. M. & Co. were bankers, and Luke Lade kept cash with them:—*Held*, that this paper was a warrant for the payment of money, as, if genuine, it would have been a warrant from Luke Lade to the bankers to pay the money to J. S.

FORGERY.—The prisoner was indicted for uttering a forged warrant for the payment of money, with intent to defraud "George Molineux and others," who were bankers.

The case was completely proved, if the writing uttered was properly described as a warrant for the payment of money.

It was in the following terms:

"To Molineux & Co.

"Pay to my order, two months after date, to Mr. John Smith, the sum of eighty pounds, and deduct the same out of my account. "£80 0 0."

Accepted,
Luke Lade.

after date, to Mr. John Smith, deduct the same out of my account.

*The paper did not bear any signature, but on the back of it was written,

"John Smith,

"Farmer,

"Hailsham,

"Sussex."

It was proved that John Smith was a farmer at Hailsham, but that he was not a customer of the bankers, Messrs. Molineux & Co., but that Luke Lade was a customer of that firm, and kept money with them.

Clarkson, for the prisoner, submitted, that the paper was not a warrant for the payment of money, and cited the cases of *Regina v. Bartlett*, 2 M. & Rob. 362; *Regina v. Thorn*, C. & Mar. 206; *Regina v. Crooke*, 8 C. P. 582; and *Regina v. Hussey*, Law Times of March, 1844.

Lord DENMAN, C. J., reserved the point for the opinion of the fifteen judges.

Verdict—Guilty.

J. J. Johnson, for the prosecution.

Clarkson, for the prisoner.

In the ensuing term the case was considered by the fifteen judges, who held the conviction right, their lordships being of opinion that the paper was a warrant from Luke Lade to the bankers to pay to John Smith, and, if genuine, would have been a warrant to the bankers to pay the money. (a)

(a) See the case of *Regina v. Vivian*, post, p. 719.

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*KINGSTON ASSIZES.

(Civil Side.)

BEFORE BARON ALDERSON.

GIRDLESTONE v. M'GOWRAN and PROCTER.

In replevin the defendants made cognisance, first, as bailiffs of A. and B., secondly, as bailiffs of A.:—*Held*, that B. was not a competent witness for the defendant to sustain the second cognisance, though the defendants gave no evidence to sustain the first cognisance, and offered to abandon it.

REPLEVIN for taking the plaintiff's goods and chattels. There were two cognisances. The first was in the ordinary form, for a distress for rent, issuing out of the locus in quo, as bailiffs to James and Francis M'Gowran. The second cognisance stated, that the corporation of London demised the locus in quo, with other lands, at a yearly rent, to W. Hadnutt, for sixty-one years, who assigned his term to T. M'Gowran deceased, who, by his will, bequeathed the locus in quo, subject to the entire rent, to the plaintiff, and bequeathed the rest of the demised premises to certain other persons, and that the testator directed, that, in case the rent should be left in arrear, and the legatees of the residue of the demised premises, or their assigns, should pay the rents to the corporation, they should have the same remedy by distress upon the locus in quo as a landlord for rent.

This cognisance then proceeded to trace the title to the residue of the demised premises to James M'Gowran, and stated, that rent had become due to the corporation, which James M'Gowran had been obliged to pay, and justified the distress, under the power in the will, upon the locus in quo, for the amount so paid to the corporation by James M'Gowran.

Francis M'Gowran's name was not mentioned in the second cognisance.

Pleas in bar, traversing the allegations in the cognisances, and putting in issue, amongst other facts, the *payment of rent by Francis M'Gowran

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to the corporation of London, upon which issues were joined.

No evidence was offered to sustain the first cognisance, and the case turned entirely upon the second; and upon a difficulty arising as to the proof of payment of the rent by James M'Gowran to the corporation of London, a fact not in issue upon the pleadings to the first cognisance,

Petersdorff, for the defendant, proposed to call Francis M'Gowran to prove the payment.

E. James and *Lush*, for the plaintiff, objected to the reception of his evidence, on the ground of incompetency from interest. Persons under whom cognisance is made in replevin are not admissible witnesses for the defendant. They are directly interested in the result of the cause. Lord DENMAN's Act, 6 & 7 Vict. c. 85, makes no difference in this respect, for it expressly excepts "the landlord or other person in whose right any defendants in replevin may make cognisance."

Petersdorff and *Willes*, for the defendants.—The witness is tendered in support of the second cognisance, in which he is not mentioned, and in the result of which he has no interest. The defendant will consent to abandon the first cognisance, and let the plaintiff succeed upon it. This will remove any objection on the score of interest. Lord DENMAN's Act does not create a new incompetency in a party so situate, and the reasons for exclusion will be removed by abandoning the only cognisance in which the witness can possibly have any interest.

ALDERSON, B., (after conferring with Lord DENMAN, C. J.)—I have consulted the best authority on the construction of this act, and he is of opinion that I ought to reject this witness. The defendant has put upon the record a cognisance, in which he justifies as bailiff under the proposed witness, and the case is, therefore, within the exception referred to. It is too late now to abandon the first cognisance. That [*704 should have been done before the trial. I must reject this evidence.

The cause proceeded, and ultimately the defendants had a verdict.

E. James and *Lush*, for the plaintiff.

Petersdorff and *Willes*, for the defendants.

In the ensuing term, *E. James*, in the Court of Queen's Bench, obtained a rule to show cause why judgment should not be entered for the plaintiff non obstante veredicto, or a new trial had, on grounds not at all affecting the point above reported.

MIDLAND WINTER CIRCUIT, 1844.

DERBY ASSIZES.

BEFORE MR. JUSTICE PATTESON.

REGINA v. TIVEY.

On an indictment on the stat. 1 Vict. c. 90, s. 2, for maliciously wounding cattle, it is not necessary to prove that the prisoner was actuated by malice against the owner of the cattle.

WOUNDING cattle. The prisoner was indicted for having "unlawfully, maliciously, and feloniously" wounded a mare, the property of Richard Beaumont Child.

*705] "The fact of the wounding of the mare, by the prisoner thrusting his hand and a knife into the vagina of the mare, and cutting her as she stood quietly in the stable, was clearly proved; but no evidence was given as to the motive of the prisoner. No malice was shown towards any one, and it did not appear that the prisoner knew to whom the mare belonged, or had any knowledge of the prosecutor, Richard Beaumont Child.

W. H. Adams, for the prisoner.—I submit, that, since the stat. 1 Vict. c. 90, this charge cannot be sustained unless there be evidence of malice against Richard Beaumont Child, the owner of the mare. Under the Black Act, 9 Geo. 1, c. 22, s. 1, malice against the owner was held to be essential. That statute was repealed by the stat. 7 & 8 Geo. 4, c. 27; and by the statute 7 & 8 Geo. 4, c. 30, s. 16, it was enacted, "that, if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony," and be liable to be transported for life, or any term not less than seven years, or imprisoned for any term not exceeding four years. And by section 25 of that statute, it is enacted, "that every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise." The stat. 1 Vict. c. 90, s. 2, recites, amongst other acts and clauses, the 16th section of the stat. 7 & 8 Geo. 4, c. 30; and by the latter part of that section, it is enacted, and so much of the stat. 7 & 8 Geo. 4, c. 30, "as relates to the punishment of persons convicted of any of the offences hereinbefore specified, as in those acts contained respectively, shall, from and after the commencement of this act, be, and the same are, hereby repealed; and every person convicted, after *706] the commencement of this act, of any of such offences respectively, shall be liable to be transported beyond the seas for any term not exceeding fifteen years, or to be imprisoned for any term not exceeding three years." No punishment, therefore, can now apply or be enforced

under the stat. 7 & 8 Geo. 4, c. 30, s. 16. I submit, that, consequently, the 25th section of that statute has now no operation.

Wilmore, for the prosecution.—I submit, that the true meaning of the 25th section is, that malicious offences shall be deemed complete without proof of malice against the owner of the property, or, if that section be inoperative, that general malice is sufficient.

PATTESON, J., reserved the point for the consideration of the fifteen judges. Verdict—Guilty.

Wilmore, for the prosecution.

W. H. Adams, for the prisoner.

In the ensuing term the case was considered by the fifteen judges, who held the conviction was right.

*WELSH WINTER CIRCUIT, 1844. [*707

CHESTER ASSIZES.

BEFORE BARON GURNEY.

REGINA v. RADFORD.

If A. exhibit a forged receipt to B., a person with whom he is claiming credit for it, this is an uttering within the stat. 1 Will. 4, c. 66, s. 10, although A. refuse to part with the possession of the paper out of his hand.

FORGERY.—The prisoner was indicted for uttering a forged receipt for 5*l.* 14*s.* 6*d.*, with intent to defraud Mr. Lee. There were other counts, which laid the intent to be to defraud George Turner and John Forster.

It was proved that the prisoner was a stone-mason, and had purchased stone at a quarry, the property of Mr. Lee. It was also proved that the prisoner incurred a debt of 5*l.* 14*s.* 6*d.* on the 6th of July, 1840, and that an invoice was sent without any receipt, and that the prisoner, on being from time to time called on for payment of the amount, repeatedly promised payment, but that, on his being again applied to in the month of July, 1844, he, for the first time, alleged, that he had paid for the stone at the time, viz., on the 6th of July, 1840, and that he had a receipt signed by Turner. On hearing of this, Mr. Forster, who had succeeded Turner as manager at the quarry, went over to the prisoner on the 17th of August, when the prisoner produced the receipt, and exhibited it to him to look at, but would not part with it out of his hand. On the 21st of August, Mr. Forster returned to the prisoner, taking Mr. Turner with him, and again called on him to *produce the receipt; he did produce it, and held [*708 it up for Mr. Forster and Mr. Turner to look at, but refused to part with it out of his hand. Mr. Forster, however, got it from him, and he was apprehended.

Townsend and *Egerton*, for the prisoner, contended that this was not an uttering, and cited the case of *Rex v. Shukard*, R. & R. C. C. 200.(a)

GURNEY, B.—I am inclined to think that the exhibiting of this receipt to the person with whom the prisoner was claiming credit for it was an uttering, even though he did not part with it out of his hand; but I will reserve that point for the consideration of the judges.

Verdict—Guilty.

J. Hill and *L. Trafford*, for the prosecution.

Townsend and *E. Egerton*, for the prisoner.

At Serjeants' Inn Hall.

Before Lord DENMAN, C. J. ; TINDAL, C. J. ; POLLOCK, C. B. ; PARKE, B. ; PATTESON, J. ; COLERIDGE, J. ; COLTMAN, J. ; ROLFE, B. ; CRESSWELL, J. ; ERLE, J. ; PLATT, B.

Townsend, for the prisoner.—I submit, that in this case there was no uttering of this receipt by the prisoner. In the case of *Rex v. Shukard*, the production of flash notes, in order to give the person who saw them a false idea of the party's substance, was held not to be an uttering
*709] of the flash notes, and I submit, that, in the present case, although there might be an intent to utter the forged receipt, and even a beginning to utter it, yet the uttering was not complete.

POLLOCK, C. B.—Suppose a man were to pass a turnpike gate with a forged ticket in his hand, and showed the ticket to the gate-keeper, and rode on, and was pursued and taken, would you say that that was not an uttering of the forged ticket?

Townsend.—It might be there, that, from the game-keeper letting the person pass, he acted on the production of the ticket as if it had been uttered. Tendering and uttering are not equivalent terms, as was held in the case of *Rex v. Franks*, 2 Leach, 736, which was a case on the stat. 15 & 16 Geo. 2, c. 28, which related to base coin.

COLERIDGE, J.—How could it be said that this receipt was tendered, as the prisoner refused to part with it?

Townsend.—The words in the 18th section of the stat. 1 Will. 4, c. 66, are “offer, utter, dispose of, and put off.” From Johnson's Dictionary it appears that the word “offer” imports that the person may either accept or decline the thing offered, and, from the illustrations given in Webster's Dictionary, a similar option appears to be implied.

POLLOCK, C. B.—In all these cases reference must be had to the subject. A purse is of no use except it be given. Not so a receipt or a turnpike ticket. A promissory note must be tendered, to be taken. Not so a receipt, as the person who has it is to keep it.

Townsend.—The prisoner here is convicted of “uttering.” In the different statutes as to forgery, different expressions are used. In the
*710] stat. 5 & 6 Will. 4, c. 24, s. 3, as to protection from service in the navy, the words are “produce, utter, or make use of.” In the 4th section of the stat. 2 & 3 Will. 4, c. 16, as to excise permits, the words are “utter, give, or make use of,” and in the 13th section of the same statute,

(a) In that case it was held, that showing a person a flash note, the uttering of which would be criminal, with an intent to raise in him a false idea of the party's substance, was not an uttering within the stat. 13 Geo. 2, c. 79, which prohibited the uttering of notes expressing the sum in white letters on a black ground, without being authorized by the Bank of England.

the words are "utter or produce." In the stat. 2 & 3 Will. 4, c. 59, s. 19, as to forged registers, the words are "utter, or deliver, or produce;" and in the stat. 5 Eliz. c. 14, as to the forging of evidences and writings, the words are, "publish, or show forth in evidence."

The case having been considered by the judges, their Lordships held the conviction right.

WELCH SPRING CIRCUIT, 1845.

CARDIGAN ASSIZES.

BEFORE MR. JUSTICE CRESSWELL.

DAVIS v. MOSELEY and LLOYD.

In trespass against two excise officers for entering the plaintiff's house, there was at the close of the plaintiff's case no evidence against one of the defendants:—*Held*, that, if no further evidence was given for the plaintiff, the plaintiff's counsel must then elect to go on as to the other defendant only, and could not wait till the defence was concluded.

In order to show in trespass that the defendant, an excise officer, entered the plaintiff's house, the defendant's affidavit was put in, by which he stated that he entered the house by virtue of a magistrate's warrant, to search for malt that had not paid duty:—*Held*, that the putting in of this affidavit by the plaintiff did not make out a defence for the defendant, as the affidavit did not state that the warrant was granted upon oath made by an officer of excise, as required by the stat. 7 & 8 Geo. 4, c. 53, s. 34.

TRESPASS.—The first count of the declaration was for breaking and entering the plaintiff's house on the 16th of *November, 1844, and [711 assaulting him; second count, for breaking into a brewhouse of the plaintiff. Plea, not guilty "by statute."^(a)

It was proved that notice of action had been served on both the defendants, who were excise officers, and that, on the night of the 16th of November, 1844, at about half-past eleven o'clock, the defendant Moseley came to the plaintiff's house, which was the Plough Inn at Cardigan, and, having got into it by forcing the back-door, he searched the house, as he then stated, "for malt," and also assaulted the plaintiff.

At the close of the case for the plaintiff there was no evidence to affect the defendant Lloyd.

(a) A summons for a particular of the statutes to be relied on by the defendants having been taken out, a particular was delivered on the part of the defendants, which referred to the statutes 9 Geo. 4, c. 25; 1 & 2 Geo. 4, c. 2; 6 Geo. 4, c. 81; 7 & 8 Geo. 4, c. 53; 1 Will. 4, c. 51; 4 & 5 Will. 4, c. 51. In the case of *Coy v. Lord Forester*, 8 M & W. 312, which was an action of trespass for hunting over the plaintiff's land, the defendant pleaded not guilty "by statute;" and on an application, founded on an affidavit of the plaintiff, that he could not discover the statute under which the defendant intended to justify, the Court of Exchequer ordered that the defendant should point out the statute, or that the words "by statute" should be struck out of the margin of the plea.

Chilton, for the defendants, submitted, that the plaintiff's counsel must now elect to go on with the case against the defendant Moseley only, and abandon it as to the defendant Lloyd. He cited the case of *Wynne v. Anderson*, 3 C. & P. 596.(a)

*712] *E. V. Williams*, for the plaintiff.—In the case of *Wright v. Paulin and Another*, R. & M., N. P. C., 128, Lord Chief Justice BEST held that a co-defendant, against whom the plaintiff has given no evidence, has no right to an acquittal to be a witness until all the other evidence for the defendants is finished; but in the case of *Carpenter v. Jones*, M. & M. 198, (n.), Lord TENTERDEN, C. J., on a similar application, after stating that judges had certainly been much in the habit of refusing to direct an acquittal till all the other witnesses have been examined, and that it was very often right to do so, said, that he was, nevertheless, of opinion that the time of taking such an acquittal is in the discretion of the judge, and that it may be taken whenever it is most convenient; and, accordingly, under the particular circumstances of that case he allowed one defendant to be acquitted immediately on the close of the opening speech of the other defendants. I submit, therefore, that I ought not to be put to elect till the case goes to the jury, after the defence is closed.

CRESSWELL, J.—If you give no evidence to affect the defendant Lloyd, you must now elect to go on as to the other defendant only.

On the part of the plaintiff, in order to fix the defendant Lloyd, an office copy of an affidavit made by the defendant Lloyd was put in. There had been an application to the Court of Exchequer to postpone the present trial till after the trial of an information filed by the attorney-general against the present plaintiff for obstructing the present defendants in the execution of their duty. In support of that application the defendant Lloyd had made this affidavit, the office copy of it being admitted under a Baron's order. The affidavit was as follows:—

"Touching an action brought in the office of Pleas of her majesty's Court of Exchequer, by John Davies, plaintiff, against John Moseley and John Lloyd, defendants. John

*713] Lloyd, of Cardigan, in the county of *Cardigan, officer of excise, one of the above-named defendants, maketh oath and saith, that, on the 16th day of November now last past, the said John Davies, the above-named plaintiff, was and still is a person carrying on a certain trade and business under and subject to the laws of excise, to wit, a brewer of beer for sale, at Cardigan, in the borough of Cardigan, and that he this deponent, and John Moseley, the other of the above-named deponents, then were, and still are, officers of excise respectively; and this deponent further saith, that he this deponent, having good cause and reason to suspect, as he this deponent was then and there informed, and verily believed, that the said John Davies was in the habit of receiving malt which had not paid the duty of excise in that behalf imposed by the statute in such case made and provided, and of mashing the same early on the Monday morning, did, on the said 16th day of November, obtain a search warrant, under the hand of David Jenkins, Esq., one of her majesty's justices of the peace in and for the borough of Cardigan, bearing date the said 16th day of November, whereby the said justice authorized and empowered him this deponent, by day or by night, (but if between the hours of eleven o'clock of the night and five in the morning, then in the presence of a constable or other lawful officer of the peace,) to enter into every place in and about the house and premises of John Davies, the above-named plaintiff, at Cardigan, in the borough of Cardigan, and to seize and carry away all malt, and all other

(a) See also the case of *Child v. Chamberlain*, 6 C. & P. 213, in which case Baron Parke said, "It has been settled by the unanimous opinion of the judges, that, if there be no evidence against any one defendant on the conclusion of the case on the part of the plaintiff, such defendant is to be acquitted; so that all defendants, not fixed by the plaintiff's evidence, are to be acquitted before any part of the defence is gone into. This was the unanimous opinion of all the judges; before that, there was a discrepancy in the practice."

goods and commodities forfeited under and by virtue of a certain act of Parliament relating to the revenue of excise, that he this deponent should there find deposited and concealed; and this deponent further saith, that, on the said 16th day of November, between the hours of ten and eleven of the clock in the evening, he this deponent and the said John Moseley, as such officers of excise as aforesaid, and by virtue of the said warrant, went to the said house of the said plaintiff at Cardigan aforesaid, when he this deponent found the front door of the said house locked, and thereupon knocked at the same, and informed the said plaintiff, who was then within the said house, that he this deponent was come to search for smuggled malt; and he this deponent and the said John Moseley demanded admission into the said house; and this deponent further says, that the front door of the said house not having been opened to admit him, this deponent, and the said John Moseley into the said house, he the said John Moseley proceeded to the back part of the said house; and this deponent further says, that very shortly afterwards he this deponent heard the said John Moseley within the said house of the said plaintiff calling for help; and this deponent further says, that the door of the said house having been soon afterwards opened by some person within the same, he this deponent then entered the said house, and found the said John Moseley therein contending with the said plaintiff as to his the said John Moseley's right to enter the said house; and this deponent further says, that the said plaintiff did, with much violence, oppose, molest, and obstruct, and hinder him this deponent and the said John Moseley in the due execution of a certain act of Parliament relating to the revenue of excise, passed in the 7th and 8th years of the reign of his late majesty King George the Fourth, entitled 'An Act to consolidate and amend the Laws relating to the Collection [*714 and Management of the Revenue of Excise throughout Great Britain and Ireland,' and in the execution of the power and authority by the said act, and by the said warrant, given and granted to this deponent and the said John Moseley, as such officers of excise; and this deponent further says, that proceedings have been commenced, and are now depending, in her majesty's Court of Exchequer, at Westminster, at the suit of her majesty's attorney-general, against the said plaintiff, for recovery of the penalty incurred by him under the said act of Parliament for such opposition, molestation, obstruction, and hindering of him this deponent and the said John Moseley, as such officers of excise as aforesaid; and this deponent further says, that he verily believes that the above-mentioned action (in which a copy of the declaration delivered is hereunto annexed) hath been brought and commenced by the said plaintiff against him this deponent and the said John Moseley, for and on account of the said entry of him this deponent and the said John Moseley, as officers of excise, and under the said search warrant, into the said house of the said plaintiff as aforesaid, and for no other cause whatsoever.

"Sworn, &c."

Chilton addressed the jury for the defendants, and contended, that the putting in of this affidavit made out a good defence for the defendants.

CRESSWELL, J., (in summing up.)—There is no doubt that the defendants went to the plaintiff's house to search for smuggled malt. Their entry into the house was not justified under the 22d section of the stat. 7 & 8 Geo. 4, c. 53, as that enactment relates to entering houses in order to take the duties; and the 16th section of the subsequent statute, 1 Will. 4, c. 51, merely changes the hours. The defendants clearly intended to act under the 34th section of the statute 7 & 8 Geo. 4, c. 53; (a) but as it

(a) By which it is enacted, "That, if any officer of excise shall have cause to suspect that any goods or commodities forfeited under or by virtue of this act, or any other act or acts of parliament relating to the revenue of excise, are deposited or concealed in any place, then and in every such case, if such place shall be within the limits of the chief office of excise in London, upon oath being made by such officer before the commissioners of excise, or any two or more of them, or if such commissioners shall not be publicly sitting for the despatch of business, or such place or places shall be in any other part of the United Kingdom out of the limits of the said chief office, then, upon such oath being made before one or more justice or justices of the peace for the county, shire, division, city, town, or place where such officer shall suspect such goods or commodities to be deposited or concealed, setting forth the ground of such suspicion, it shall be lawful to and for the said commissioners, or any two or more of them, or the justice or justices of the peace respectively, (as the case may be,) before whom such oath shall be made, if he or they shall judge it reasonable, by special warrant or warrants under

715] in *no way appears that the warrant on which they acted was founded on an information on oath, I am of opinion that the defendants have no defence, and that you ought to give the plaintiff reasonable damages for what was done at his house by the defendants.

Verdict for the plaintiff—Damages 40s.

E. V. Williams and *E. C. Lloyd Hall*, for the plaintiff.

Chilton and *T. Allen*, for the defendants.

his or their hands respectively, to authorize and empower such officer, by day or by night, (but if between the hours of eleven of the clock at night and five in the morning, then in the presence of a constable or other lawful officer of the peace,) to enter into every such place where any such goods or commodities shall be suspected to be deposited or concealed, and to seize and carry away the same; and it shall be lawful for any officer to whom any such warrant shall be given or granted, and he is hereby authorized, in case of resistance, to break open any door, and to force and remove any other impediment or obstruction to such entry, search, or seizure, and removal as aforesaid."

*716]

*PRESTEIGN ASSIZES.

BEFORE MR. JUSTICE CRESSWELL.

HOBBY v. RUELL, sued Executor of JOHN SMITH.

A. had ordered a pair of boots of B., and had paid B. for them. The boots had never been delivered to A., and, being in the hands of the journeyman who made them, A. was obliged to pay the journeyman the price of making them before he could get possession of them. A. being sued as executor *de son tort* of B.:—*Held*, that he was liable for the value of the boots as executor *de son tort*, but that he was entitled to be allowed the sum he paid the journeyman.

A., after the death of B., obtained possession of the cattle of B. from C., with whom they were agisted, A. paying C. for the agisting; A. being sued as executor *de son tort* of B.:—*Held*, that he was not entitled for the sum he paid to C. for the agisting of the cattle.

COVENANT against the defendant, as executor of John Smith. The declaration stated, that John Smith, in his lifetime, to wit, on the 11th of August, 1843, by an indenture between him of the one part, and the plaintiff of the other part, covenanted to pay the plaintiff the sum of £50 on the 11th of August, 1844. Breach, that John Smith did not pay in his lifetime, nor the defendant since his death. Plea, that the defendant had fully administered all the goods and chattels which were of John Smith at the time of his death, and which had come to the hands of the defendant, as his executor, to be administered, except goods and chattels of insufficient value to satisfy the damages sustained by the plaintiff, by reason of the cause of action in the declaration mentioned, to wit, except goods and chattels of the value of £15, and that the defendant had not, at any time, goods and chattels which were of John Smith, to be administered, except the said goods and chattels aforesaid, (concluding with a verification.) Replication, that the defendant, at the time of the commencement of this suit, had goods and chattels which were of John Smith, at the time of his death, in his hands, as executor, of great value, to wit, of the value of the damage sustained by the plaintiff, by reason of the premises, and *who, 717] with the defendant as executor, could have satisfied those damages. (concluding to the country.)

It was opened by *Chilton*, for the plaintiff, that the defendant was sued as an executor de son tort, and that, after the death of John Smith, the defendant took possession of a cow, and calf, a barren cow, a poney-mare, and colt, and a hackney mare, which had been the property of John Smith; and also of a new pair of boots, which John Smith, who was a boot and shoemaker, had made for the plaintiff, but which had not been delivered at the time of John Smith's death. The question raised by the pleadings was, whether the property of John Smith, which had come to the defendant's possession, was of the value of £15, or of more.

It appeared, with respect to the pair of boots, that the defendant had ordered a pair of boots of the deceased John Smith, and had paid him for them in his lifetime, but that the boots had not been delivered to the defendant before John Smith's death, and that, in order to obtain possession of the boots, the defendant had been obliged to pay Henry Price (a person whom John Smith had employed to make them) the amount due to him for the making, as he would not give them up without being paid.

CRESSWELL, J.—The defendant is to be charged, in this action, with the value of the boots, deducting what he paid to Henry Price for the making of them. The defendant had no right to take these boots, though he had paid the price of a pair of boots, because the deceased's contract with him would have been satisfied by the delivery of a pair of boots; and, though intended for him, the deceased had done no act in any way to appropriate this particular pair of boots to the defendant. Still I think that the defendant is entitled to be allowed for what he paid to Henry Price, as Henry Price had a lien upon these boots to that amount.

*With respect to the cattle, it appeared, that, at the time of the death of John Smith, the cow and calf were agisted with Mr. Edward Jones, of Byton, and that the defendant paid Mr. Edward Jones for their agistment in order to obtain possession of them. [718 (a)]

CRESSWELL, J.—The defendant is not entitled to any allowance in respect to what he paid to Mr. Edward Smith, as Mr. Smith had no lien on the cattle for their agistment.

Evidence, which was very contradictory, was given on both sides, as to the value of the cattle.

CRESSWELL, J., left the case to the jury, on the question, whether the value of the property was above £15 or not.

Chilton and *Severn*, for the plaintiff.

E. V. Williams and *Davison*, for the defendant.

In the ensuing term *Chilton* applied to the Court of Exchequer for a new trial, but the court refused a rule.

(a) In the case of *Jackson v. Cummins*, 5 M. & W. 342, it was held, that no lien exists at common law for the agistment of milch cows.

*719] *WESTERN SUMMER CIRCUIT, 1844.

CORNWALL ASSIZES.

BEFORE MR. JUSTICE PATTESON.

REGINA v. HENRY VIVIAN, the Younger.

A. uttered a forged paper in the following form :—"Mr. M. will be pleased to send by the bearer 10*l*. on Mr. H.'s account, as Mr. H. is very bad in bed, and cannot come himself." The paper purported to be signed "M. R., foreman, St. A. Foundry." Mr. M. was clerk to Messrs. C., bankers, with whom Mr. H. kept an account, and R. was foreman to Mr. H., but had no authority to draw on Mr. H.'s banker :—*Held*, that this was a warrant for the payment of money. *Held*, also, that any instrument for payment, under which, if genuine, the payer may recover the amount against the party signing it, may be properly considered a warrant for the payment of money; and that it is equally this, whatever be the state of the account between the parties, and whether the parties signing it has at the time funds in the hands of the party to whom it is addressed or not. *Held*, also, that, as by this instrument, if genuine, R. says in effect that he has the authority of Mr. H., who had an account with the bankers, it is as much a warrant as if he himself had had such an account, and would equally have bound him.

FORGERY.—The prisoner was indicted for uttering, on the 25th of May, 1844, a forged warrant and order for the payment of money, with intent to defraud Edward Coode and others. The forged instrument was in the following form :—

"Mr. Martin will be pleased to send by the bearer £10 on Mr. Hodge's account, as Mr. Hodge is very bad in bed, and cannot come himself.

MARTIN RALPH, Foreman,

"St. Austell Foundry."

It was proved that Mr. Martin was clerk to Messrs. Coode & Co., who were bankers, with whom Mr. John Hodge kept an account, and that Mr. Hodge was ill in bed on the 25th of May, 1844, which was a Saturday, his usual pay-day. It was proved, that it was the duty of Ralph, Mr. *720] Hodge's foreman, to pay Mr. Hodge's labourers, and that he had no general authority to draw for money; but that he had once, in the January preceding, drawn a check, which Mr. Hodge had adopted, but he had not given him any authority to draw this check, which was not in Ralph's handwriting, neither had he (Ralph) authorized any one to draw it, nor had Mr. Hodge. It did not positively appear how Mr. Hodge's account stood at Messrs. Coode's on the 25th of May, 1844; but Mr. Martin paid the amount of the forged check without hesitation, and stated, that his impression was, that the account was in Mr. Hodge's favour.

Merivale, for the prisoner, objected, that this instrument was not a warrant or order for the payment of money, and cited the cases of *Rex v. Baker*, 1 M. C. C. 231; *Rex v. Ravenscroft*, R. & R. C. C. 161; *Regina v. Thorn*, C. & Mar. 206; *Regina v. Roberts*, C. & Mar. 652, and *Rex v. Clinch*, 2 Ea. P. C. 938.(a)

PATTESON, J., reserved the point for the consideration of the fifteen judges.

Verdict—Guilty.

W. C. Rowe, for the prosecution.

Merivale, for the prisoner.

(a) See also the case of *Regina v. Smith*, *ante*, p. 700.

At the ensuing Cornwall Assizes, COLERIDGE, J., delivered judgment as follows:—

“The judges have considered this case, and are of opinion, that the objection taken at the trial cannot be *sustained. Any instrument for payment under which, if genuine, the payer may recover the [*721 amount against the party signing it, may properly be considered a warrant for the payment of money, and it is equally this, whatever be the state of the account between the parties, and whether the party signing it has, at the time, funds in the hands of the party to whom it is addressed or not. This case may be said to be removed one step further than the ordinary one, where the name of the actual accountant is forged, because Ralph had himself no account with Messrs. Coode & Co.; but by this instrument, if genuine, Ralph says, in effect, that he had authority from Mr. Hodge, who had an account with them; as against him, therefore, it is as much warrant as if he himself had had such account, and would have equally bound him. The difference in the fact, therefore, is immaterial in principle. It may not be easy to reconcile all the decisions on this point, and one of the judges doubted upon the propriety of that which I am now pronouncing, upon this ground, and principally on the case of *Regina v. Thorn*. He was, however, quite satisfied with the soundness of the principle on which we now proceed.”

His lordship sentenced the prisoner to be imprisoned and kept to hard labour for two years, to date from the assizes at which the trial took place.

*WESTERN SPRING CIRCUIT, 1845. [*722

SALISBURY ASSIZES.

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. SARAH WILLIS.

An indictment for the murder of a bastard child, which described the prisoner as a single woman, stated, that she, being big with a male child, did bring forth the said child alive, and that she “afterwards, to wit, on the day and year aforesaid, with force and arms, at, &c., in and upon the said male child, feloniously, &c., did make an assault,” &c.:—*Held*, that the child was sufficiently described, although the indictment neither stated the name of the child, nor that its name was to the jurors unknown, nor that it had no name.

MURDER.—The indictment stated that Sarah Willis, late of, &c., single woman, on the 27th day of August, 1844, at, &c., being big with a male child, did then and there bring forth of her body the said male child alive, and that she afterwards, to wit, on the day and year aforesaid, with force and arms, at, &c., in and upon the said male child, feloniously, &c., did make an assault; and the indictment then proceeded to describe the means of killing by strangulation, and the result, in the usual form of an indictment for murder.

The jury acquitted the prisoner of the murder, and found her guilty of concealment.

Slade, for the prisoner, objected, in arrest of judgment, that the indict-

ment was defective, because it neither stated the name of the child, nor that its name was to the jurors unknown, nor that it had no name.

*723] COLERIDGE, J.—I think that the objection ought not to *prevail. The objection is founded in this: that it must be presumed that the child had a name; but this child could only acquire a name by reputation, because it was an illegitimate child, and had no name when it came into the world. To state that its name was to the jurors unknown assumes that something had been done by which the child had acquired a name; but as there is nothing here to show that the child had acquired any name, that allegation is unnecessary. However, if there should be any thing in the objection, you shall have the benefit of this hereafter.

His lordship reserved the case for the opinion of the fifteen judges.

Merewether, for the prosecution.

Slade, for the prisoner.

In the ensuing term the case was considered by the fifteen judges, who held the conviction right, as an illegitimate child has no name till it has acquired one by reputation.(a)

(a) In the case of *Regina v. Biss*, 8 C. & P. 778, it was held, that an indictment against a married woman for the murder of her *legitimate* child, which stated that she "in and upon a certain infant child of tender age, to wit, of the age of six weeks, and not baptized, feloniously, wilfully," &c., did make an assault, &c., was bad. See also the case of *Regina v. Campbell*, ante, p. 82.

*724] *REGINA v. GOODFELLOW, ANDREWS, and Six Others.

In a case of night poaching by three or more armed, if one has a gun, all are armed within the stat. 9 Geo. 4, c. 69, s. 9.

NIGHT poaching.—The eight defendants were indicted on the stat. 9 Geo. 4, c. 69, s. 9, for night poaching on land of Robert Henry, Earl of Pembroke and Montgomery.

The indictment charged that they, "being armed with guns and other offensive weapons, entered certain land," &c.

The jury found that the first two defendants, Goodfellow and Andrews, were armed each with a gun, the other six with bludgeons.

Hodges and *Edwards*, for the defendants, objected that a mere constructive arming was not sufficient under the stat. 9 Geo. 4, c. 69, and that the jury ought to be directed to acquit every defendant who was not armed with a gun; and that no reliance could, in this case, be placed on the words of the statute, which related to arming otherwise than by guns, as the words of the 9th section of the statute were, "being armed with any gun, crossbow, fire-arms, bludgeon, or any other offensive weapon;" and the indictment ought to have specified the offensive weapon in any case, and particularly when the weapon intended to be proved was one of those named in the statute. They cited the case of *Regina v. Davies*, 8 C. & P. 759.(a)

COLERIDGE, J., overruled the objection, but reserved the case for the opinion of the fifteen judges. Verdict—Guilty as to all the defendants

*725] **Merewether*, for the prosecution.

Hodges and *Edwards*, for the defendants.

(a) In which it was held, by Mr. Justice Patteson, that, under the stat. 9 Geo. 4, c. 69, s. 9, a constructive arming was not sufficient.

In the ensuing term the case was considered by the fifteen judges, who held the conviction right, and that, if any one of the defendants had a gun, all were armed within the meaning of the stat. 9 Geo. 4, c. 69, s. 9, overruling the case of *Regina v. Davies*, 8 C. & P. 759.

TAUNTON ASSIZES.

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. PERRY.

A. was indicted in one count for stealing a check, and in another count for stealing a piece of paper. It was proved, that the G. W. R. Co. drew in London a check on their London bankers, and sent it to one of their officers at Taunton to pay a poor-rate there; he at Taunton gave it to the prisoner, a clerk of the company, to take to the overseer, but, instead of doing so, he converted it to his own use:—*Held*, that, even if the check was void under the 13th section of the stat. 55 Geo. 3, c. 184, the prisoner might be properly convicted on the count for stealing a piece of paper.

LARCENY.—The prisoner, in one count of the indictment, was charged, as a servant of the Great Western Railway Company, with stealing an order for the payment of money, to wit, an order for the payment of 13*l.* 9*s.* 7*d.*, the property of the Great Western Railway Company; in another count the thing stolen was described to be “one piece of paper of the value of one penny,” of the goods and chattels of the Great Western Railway Company. In other counts, the property was laid in different ways.

*It appeared that the Great Western Railway Company being indebted for poor-rates to the overseers of the parish of Taunton [726 St. James in the sum of 13*l.* 9*s.* 7*d.*, a check for that amount was by the proper authority drawn at Paddington upon their London bankers, and then transmitted through the hands of various officers of the company to the superintendent at the Taunton station; he received it on Saturday, the 1st of March, and at the time when the prisoner, the chief clerk there, was going into the town to his dinner, placed it in his hands, ordering him to pay it to the overseer, and to bring him a stamped receipt on his return. On his return, the superintendent asked the prisoner if he had paid the overseer; he answered, “Yes;” and being asked for the receipt, said, that the overseer, not having one by him, had promised to forward it to a certain inn in the town for him. In truth, the prisoner had not paid it, and on Monday morning got it changed by a tradesman in Taunton, and applied the proceeds to his own use.

W. C. Rowe and *Edwards*, for the prisoner, objected, that the check being *issued* in Taunton, though *made* within fifteen miles of the banking-house in London, was not a valuable security, and could not be used in evidence. They cited the stat. 55 Geo. 3, c. 184, s. 13, and the case of *Ex parte Bignold*, 1 Deac. Rep. 735.(a)

(a) In which case the chief judge (afterwards Mr. Justice) Erskine says, “It appears so me, that the issuing a check means the placing it in the hands of the party entitled to demand cash for it, as a bill of exchange is not issued until it is in the hands of the party entitled to receive the payment of it, for till then it may be altered without requiring a fresh stamp.”

COLERIDGE, J., overruled the objection, and reserved the case for the opinion of the fifteen judges. Verdict—Guilty.

*727] *Kinglake*, Serjt., and *Phinn*, for the prosecution.
W. C. Rowe and *Edwards*, for the prisoner.

Before Lord DENMAN, C. J.; TINDAL, C. J.; POLLOCK, C. B.; ALDERSON, B.; PATTESON, B.; WILLIAMS, J.; COLERIDGE, J.; COLTMAN, J.; ROLFE, B.; WIGHTMAN, J.; CRESSWELL, J.; ERLE, J.; and PLATT, B.

W. C. Rowe.—I submit that this check was void, and that the prisoner could not be properly convicted of stealing it.

Lord DENMAN, C. J.—It is not a piece of paper of the value of one penny.

ALDERSON, B.—There is no difference in the offence of stealing a check and stealing a piece of paper, and the count which states this to be a piece of paper puts an end to all question.

W. C. Rowe.—The only two cases at all resembling the present case are *Rex v. Clark*, R. & R. C. C. 181, and *Rex v. Bingley*, 5 C. & P. 602. In the former of these cases it was held, that a person who stole re-issuable notes after they had been paid might be convicted of larceny, in stealing the piece of paper bearing the stamps; and in the latter, that a piece of paper on which the prosecutor had written a memorandum as to some money due to him was the subject of larceny. In those cases the paper might be of some value to the owner; but it is here rendered valueless by a void security being written on it. Mr. Serjeant Hawkins, in treating of those things which are the subject of larceny, says, (a) "They ought to *728] have some worth in themselves, and not to derive their whole value from the relation they bear to some other thing which cannot be stolen, as paper or parchment on which are written assurances concerning lands, or obligations, or covenants, or other securities for a debt, or other chose in action."

WIGHTMAN, J.—Not as valuable securities; but are they not pieces of paper?

CRESSWELL, J.—If a blank check had been stolen, would that be a larceny?

W. C. Rowe.—I think it would.

CRESSWELL, J.—Would it be worse for being filled up? bankers' paid notes were held to be the subject of larceny of the stamps and paper, and I do not see how the stamps carry the thing further, except by making the paper of greater value.

TINDAL, C. J.—There are two charges here—the one a charge of stealing a valuable security, the other a charge of stealing a piece of paper. You may get rid of the first by its being a bad check, but how can you get rid of the other?

W. C. Rowe.—It appeared to me that the effect of converting the paper into a check was to make it valuable, if at all, as a security for money, and that, the moment the paper had a check written upon it, it became a chose in action, which is not the subject of larceny.

ALDERSON, B.—The nature of the paper is not so wholly absorbed in the chose in action as you put it.

W. C. Rowe.—If the paper is not wholly absorbed in the chose in action, I should submit that it was of so *infinitesimal value as to [*729 fall within the rule *de minimis non curat lex*.

Lord DENMAN, C. J.—Your client got 13*l.* 9*s.* 7*d.* for it.

W. C. Rowe.—This check never could fulfil any good purpose, for want of a stamp. I submit, therefore, that it was valueless, and not the subject of larceny.(a)

Lord DENMAN, C. J.—We will consider this case, but we do not think it necessary to hear Mr. Phinn.

Phinn, for the prosecution, was not heard.

The case was considered by the judges, who held the conviction right, as, at all events, there was a stealing of a piece of paper, which was sufficient to sustain a count for larceny.

(a) See the case of *Rex v. Mead*, 4 C. & P. 535.

*NORTHERN SUMMER CIRCUIT, 1843. [*730

DURHAM ASSIZES.

BEFORE MR. JUSTICE WIGHTMAN.

REGINA v. DUNN.

A., being indicted for perjury at the spring assizes, 1843, at those assizes entered into recognisances to try at the summer assizes, 1844; but, it being discovered before that time that the indictment was defective, another indictment was prepared and found at those assizes, on which the prosecutor wished the defendant to be tried:—*Held*, that the defendant was entitled to have the first indictment disposed of before he could be tried on the second; but the judge quashed the first indictment upon the terms of the prosecutor paying the defendant his costs of the traverse and recognisance, and the defendant proceeding to trial on the second indictment without traversing.

A *nolle prosequi* can only be entered by the authority of the Attorney-general.

An indictment for perjury, alleged to have been committed on a writ of trial, stated the trial to have taken place before the high sheriff. It was proved, that, when the defendant gave evidence on the writ of trial, neither the high sheriff nor the under sheriff were present, but that the writ of trial was executed before Mr. S., the sheriff's assessor, who was proved to have been in the constant practice of acting as the sheriff's assessor and deputy; but the writ of trial was directed to the sheriff, and it was stated in the *postea*, that the trial took place before him:—*Held*, that the allegation in the indictment was supported, and that it sufficiently appeared that Mr. S. had authority to execute the writ of trial.

PERJURY.—A true bill was found by the grand jury against the defendant, at the Durham Spring Assizes, in 1843, upon which a bench-warrant was issued, and the prisoner being immediately apprehended, he (at the same assizes) traversed to the next summer assizes for that county. Before the next summer assizes it was discovered, that there were defects in the

indictment, and, accordingly, a fresh bill was prepared and found by the grand jury against the defendant at the Durham Assizes in July, 1843.

Archbold, (with whom was *Hindmarsh*,) for the prosecution, proposed to try the prisoner upon the second indictment.

R. Matthews, for the prisoner, objected, that the defendant appeared in pursuance of his recognisance, and *traversed to the first indictment, and was, therefore, entitled to have the first indictment tried or disposed of before he was tried on the second.

WIGHTMAN, J., held, that the defendant was entitled to have the first indictment disposed of before he could be tried on the second.

Archbold then proposed to enter a *nolle prosequi* upon the first indictment, but

WIGHTMAN, J., held, that a *nolle prosequi* could only be entered by the authority of the attorney-general.

Archbold then moved to quash the former indictment, upon the ground of defects apparent on the face of it.

R. Matthews, for the defendant, admitted that the first indictment was bad, but submitted, that the defendant was entitled to be tried upon it, so that he might have the benefit of a plea of *autrefois acquit* or *autrefois convict*, upon the trial of the second indictment; and that, at all events, the prosecutor could not be permitted to have the first indictment quashed, except upon the terms of paying the defendant's costs.

WIGHTMAN, J., said, that the defendant was not entitled as of right to be tried on the defective indictment, and that he could not derive any benefit from such a trial, and that the first indictment should be quashed; but that, if the defendant would at once go to trial upon the second indictment, without traversing to the next assizes, the indictment should only be quashed upon the terms of the prosecutor paying to the defendant the costs of the traverse and recognisance. (a)

*The amount of the costs was at once determined by the clerk of the crown for the county palatine, and paid to the defendant, upon which the first indictment was quashed, and the defendant was immediately tried upon the second indictment.

The indictment upon which the defendant was then tried, alleged, that a certain action for a certain debt and demand was depending in the Queen's Court of Pleas at Durham, whereby one John Nicholson was plaintiff, and one Francis Snaith, defendant, wherein the sum sought to be recovered did not exceed 20*l.*; and that before Edward Shepperdson, Esq., then and still being sheriff of the county of Durham, a certain issue before then joined in the said action came on to be tried, and was, by virtue and in pursuance of a writ of our lady the queen, duly tried before the said Edward Shepperdson, Esq., then being such sheriff as aforesaid, and by a jury of the said county. It then stated, that the defendant was produced as a witness, and was sworn before the said Edward Shepperdson, Esq., so then and there being such sheriff as aforesaid, the said Edward Shepperdson, Esq., having competent authority to administer the oath, and that, being so sworn, the defendant falsely, &c., before the jurors so sworn to try the said issue, and before the said Edward Shepperdson, Esq., so then and there being such sheriff as aforesaid, did depose and swear, &c. [setting out the evidence given by the present defendant, which was to the

(a) See the cases of *Rex v. Webb*, 3 Burr. 1468; *Rex v. Wynn*, 2 East, 226; and *Rex v. Glenn*, 3 B. & Ald. 373.

effect, that the present defendant saw the original defendant pay the debt to the plaintiff in the action, and assigned perjury upon it.)(a)

*On the part of the prosecution, the writ of trial in the action of [*733
Nicholson v. Snaith (in the Court of Pleas at *Durham) was given [*734
 in evidence with the *postea* endorsed, from which it appeared that

(a) The indictment was in the following form:—"The jurors, &c., upon their oath, present, that heretofore, to wit, on the 8th day of March, in the sixth year of the reign of our said lady the queen, a certain action of debt for a certain debt and demand was depending in the court of our said lady the queen before her justices at Durham, that is to say, in our said lady the Queen's Court of Pleas at Durham, wherein one John Nicholson was plaintiff, and one Francis Snaith was defendant, and wherein the sum of money sought to be recovered, and endorsed on the writ of summons, did not exceed £20; and that heretofore, to wit, on the said 8th day of March, in the year aforesaid, at the parish of St. Aswald, in the county of Durham, before Edward Shepperdson, Esq., then and still being sheriff of the said county of Durham, a certain issue before then joined between the said John Nicholson and Francis Snaith, in the said action, came on to be tried in due form of law, and according to the form of the statute in such case made and provided, and was then and there, by virtue and in pursuance of a writ of our said lady the queen, directed to the said sheriff of the said county of Durham in that behalf, in due form of law, and according to the form of the statute in such case made and provided, duly tried before the said Edward Shepperdson, Esq., so then being such sheriff as aforesaid, and by a jury of the said county of Durham, in that behalf duly summoned, taken, and sworn between the parties aforesaid.

"And that, upon the said trial of the said issue, one William Dunn, late of the parish of St. Aswald, in the said county of Durham, labourer, then and there appeared, and was produced as a witness for and on behalf of the said Francis Snaith, and was then and there duly sworn, and took his corporal oath upon the holy Gospel of God, before the said Edward Shepperdson, so then and there being such sheriff as aforesaid, that the evidence which he the said William Dunn should give to the said sheriff and to the said jury so sworn as aforesaid, touching the matter in question between the said parties, should be the truth, the whole truth, and nothing but the truth, (he the said Edward Shepperdson so then and there being such sheriff as aforesaid, and then and there having sufficient and competent authority to administer the said oath to the said William Dunn in that behalf;) and that, at and upon the said trial of the said issue so joined between the said parties as aforesaid, to wit, on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, it then and there became and was a material question, whether the said Francis Snaith had paid to the said John Nicholson divers, or any, sums or sum of money, in the whole amounting to a large sum of money, to wit, the sum of 9l. 18s. 6d., in full satisfaction of a certain sum of money, to wit, the sum of 9l. 18s. 6d., theretofore due and owing from the said Francis Snaith to the said John Nicholson, and also whether the said Francis Snaith had paid or delivered to the said John Nicholson any sum or sums of money, or any promissory note or promissory notes in payment or satisfaction, or in part payment or satisfaction, of a certain sum of money, to wit, the sum of 9l. 18s. 6d., theretofore due and owing from the said Francis Snaith to the said John Nicholson.

"And that the said William Dunn, having been sworn as aforesaid, not having the fear of God before his eyes, not regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to prevent the due course of law and justice, and unjustly to aggrieve the said John Nicholson, the said plaintiff in the said action, and to deprive him of the benefit of the said suit then in question, and to subject him to the payment of sundry heavy costs, charges, and expenses, then and there on the said trial of the said issue, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said jurors so sworn to try the said issue as aforesaid, and before the said Edward Shepperdson, Esq., so then and there being such sheriff as aforesaid, did depose and swear (amongst other things) in substance and to the effect following; (that is to say.)

"I saw Snaith's wife bring out some money and give it to her husband, (thereby meaning that the said Wm. Dunn had seen the wife of the said Francis Snaith bring out some money, and give it to the said Francis Snaith, her husband;) Snaith took the £5 note, and laid it on the table, (thereby meaning that the said Francis Snaith took a promissory note for the payment of £5, and laid it on a table,) shoved it along, (thereby meaning that the said Francis Snaith shoved a promissory note for the payment of £5 along a certain table to the said J. Nicholson,) and said to Nicholson, (thereby meaning that the said F. Snaith said to the said J. Nicholson,) "Look at that," (meaning

...the ... of that ... upon
... which was ... given in
... that ... entered

... and I was stated

... that the
... five pieces
... each :)

... the ... house
... at ... by so
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... the said John
... the said Francis Smith
... and ... was so
... five pieces of the
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... the said John Nichol-
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both in the *postea* and the record in the action that the trial had taken place before Edward Shepperdson, Esq., sheriff of the county of Durham.

The evidence given by the present defendant William Dunn, and upon which perjury was assigned, was proved by a witness, who stated that the trial took place before Mr. Stapylton, the sheriff's assessor, neither the sheriff nor the under sheriff being present. The witness also stated that Mr. Stapylton had been in the constant practice of acting as the sheriff's assessor and deputy.

R. Matthews, for the defendant Dunn, objected that there was a variance between the indictment and the proof, the indictment stating that the defendant was sworn before the sheriff himself, the proof being that he was sworn before a deputy only.

Hindmarsh, for the prosecution.—The constant and notorious practice has always been to try causes upon writs of trial before the under sheriff or some other deputy, and there is no material difference between an under-sheriff and the deputy sheriff in this respect, and the form of *postea* or endorsement of the verdict as given by the general rules *of the [*737 superior courts of Hilary Term, 4 Will. 4, (1834,) always states the trial to have taken place before the sheriff himself. It could hardly be contended that an under sheriff or deputy has no power to try a cause upon a writ of trial; for, if that were so, every trial upon such a writ which has taken place since the passing of the statute 3 & 4 Will. 4, c. 42, is void, and as the statute does not mention the under or deputy sheriff, the *postea* or endorsement of the verdict states the trial to have taken place before the sheriff, on the ground that the act of the sheriff's deputy is the act of himself, according to the maxim *qui facit per alium facit per se*.(a) The proper way of alleging, in pleading, the performance of an act which may lawfully be done by deputy is, to allege that the act was done by the principal himself, as in this case it is in substance alleged that the cause was tried and oath was administered by the sheriff himself. I also submit, that, as the records which have been given in evidence state that the trial has taken place before the sheriff himself, parol evidence cannot be given to contradict these records. With respect to the second objection, I submit that there was sufficient evidence of Mr. Stapylton's authority, it having been shown that he had been in the habit of acting as assessor and deputy of the sheriff.

R. Matthews, in reply.—The indictment ought to have alleged, as the fact was, that the defendant was sworn before Mr. Stapylton as the deputy of the sheriff, and not before the sheriff himself; and the defendant being no party to the former suit, he is not estopped from showing the fact that the defendant was sworn before a deputy of the sheriff, and not before the sheriff himself, as stated in the indictment. I also submit, that the appointment of Mr. Stapylton as deputy sheriff should have been given in evidence.

*WIGHTMAN, J.—I will not stop the case, but, if necessary, re-serve the point for the consideration of the judges. [*738

The trial accordingly proceeded, and, the defendant having been convicted, judgment was respited until the next assizes.

Archbold and *Hindmarsh*, for the prosecution.

R. Matthews, for the prisoner.

(a) See Co. Litt. 258 a.

At the ensuing assizes, COLTMAN, J., in giving judgment, stated that a majority of the judges were of opinion that the proof given in support of the indictment was sufficient; and the defendant had judgment for two years' imprisonment and hard labour.

Immediately after the trial in this case, *Hindmarsh* moved for the costs of the prosecution generally; but the prosecutor not having been under any recognisance to prosecute, his lordship held that he could only order the payment of the expenses of the witnesses who appeared at the trial in pursuance of their subpoenas.^(a)

(a) See the stat. 7 Geo. 4, c. 64, ss. 22, 23.

*739]

*LIVERPOOL ASSIZES.

BEFORE LORD CHIEF BARON POLLOCK.

REGINA v. JAMES WADE, JOHN KENYON and THOMAS LEIGH.

W. stole a watch from A., and while W. and L. were in custody together, W. told L. that he had "planted" the watch under a flag in the soot-cellar of L.'s house. After this L. was discharged, and went to the flag and took up the watch, and sent his wife to pawn it:—*Held*, that, if L. thus took the watch in consequence of W.'s information, W. telling L. in order that he might use the information by taking the watch, L. was indictable for this as a receiver of stolen goods, but that, if this was an act done by L., in opposition to W., or against his will, it might be a question whether it would be a receiving.

THE prisoners, Wade and Kenyon, were indicted for having broken and entered the house of Thomas Worsley at Warrington, and having stolen therefrom one watch, two handkerchiefs, and other articles his property, the prisoner Leigh being indicted for receiving the watch and handkerchiefs, knowing them to have been stolen.

The prisoners Wade and Kenyon pleaded guilty. The prisoner Leigh pleaded not guilty, and was tried.

It was proved by the servant of a pawnbroker that the wife of the prisoner Leigh had pledged the stolen watch on a day subsequent to the robbery, and James Jones, a constable of Warrington, also proved that he had seen all the three prisoners together, they being in custody together at Manchester, when Leigh said that he had left Kenyon's house with Kenyon before the robbery, that he had afterwards gone to Dunham (about eight miles from Manchester) and returned. Leigh was then discharged. But the witness subsequently went to Manchester again, and caused him to be again apprehended; and Leigh's wife then, in the presence of Leigh, told this witness that she had taken the watch and pawned it for 10s. She added, that Leigh had also told her to take two handkerchiefs, and that, as she was about to go with them, a policeman came, and she left
*740] them in a cellar next door to her husband's *house. Upon that information, the witness went to the cellar, and found the handker-

chiefs. Afterwards, when Leigh was in custody in the lockups with Wade, Leigh told the same witness that while he (Leigh) was before with Wade in the same place, Wade had told him (Leigh) that he had "planted" the watch and handkerchiefs under a flag in the soot-cellar in his (Leigh's) house; and that when he (Leigh) was discharged, as before mentioned, he had gone and taken the things, and had desired his wife to pledge the watch for as much as she could get upon it.

The watch and handkerchiefs were identified as the property of the prosecutor.

POLLOCK, C. B.—I doubt whether, when the possession has been transferred by an act of larceny, the possession can be considered to remain in the owner. Were it so, then every receiver of stolen goods, knowing them to be stolen, would be a thief; and so on, in series from one to another, all would be thieves. If this was an act done by the prisoner (Leigh) in opposition to Wade, or against his will, then it might be a question whether it were a receiving. But if Leigh took the articles in consequence of information given by Wade, Wade telling Leigh in order that the latter might use the information by taking the goods, then it is a receiving.

Verdict—Guilty.

Wilkins and Aspinall, for the prosecution.

*741] *NORTHERN WINTER CIRCUIT, 1844.

YORK ASSIZES.

BEFORE MR. JUSTICE COLERIDGE.

REGINA v. CARTER.

On the trial of an indictment for forgery, with intent to defraud "H. D., one of the public officers of the Y. District Bank," H. D. was called, and stated himself to be so, and an examined copy of the return forwarded to the Stamp office, under the stat. 7 Geo. 4, c. 46, in which he was stated to be so, was put in. This copy had neither the affidavit at the close of the return, which is directed by schedule A. of that statute, nor the signature, and the date was left blank; but it was not objected, that the return did not relate to the period of the uttering.—*Held*, by the fifteen judges, to be sufficient proof that H. D. was the public officer.

Whether in a case of forgery, with intent to defraud a company acting under the stat. 7 Geo. 4, c. 46, it is allowable to lay the intent to defraud one of the shareholders "and others," or whether the intent must be laid to defraud one of the public officers, *quære*.

A paper in the following form: "Mr. Johnson,—Please to pay to James Jackson the sum of £13, by order of Christopher Saddler, Thornton-le-Moor, brewer. I shall see you on Monday. Your obliged, Chr. Sadler. The District Bank," is an order for the payment of money within the stat. 1 Will. 4, c. 66, s. 3.

FORGERY.—The prisoner was charged in two of the counts of the indictment with uttering the forged instrument set out below, and which was described as an order for the payment of money; the intent was laid in the first count to be to defraud one Henry Dresser, as one of the public officers of the Yorkshire District Bank; in the latter to defraud Henry Dresser and others. The instrument was in the following form:—

"Mr. Johnson,

"Thornton-le-Moor, July 20th, 1844.

"Sir,—Please to pay to James Jackson the sum of £13, by order of Christopher Sadler, Thornton-le-Moor, brewer. I shall see you on Monday.

"Your obliged,

"The District Bank.

"CHR. SADLER."

*742] *It was proved that Christopher Sadler was a customer of the Yorkshire District Bank, and had been, till shortly before the uttering, a brewer. The agent of the bank to whom the instrument was uttered stated, that Sadler was not in the habit of drawing on the bank, but that, if he had been certain of the handwriting being his, he should have paid the money; but it was not proved that Saddler, at the date of the instrument or time of the uttering, had any effects in the bank.

To prove that Henry Dresser was the public officer of the bank, he was called, and stated himself to be so, and also a shareholder in the bank, and an *examined* copy of the return forwarded to the Stamp office was put in, in which he was stated to be so. This copy wanted the affidavit

at the close of the return,(a) and of course the signature, and the date was left in blank; but it was not objected, that the return sent to the Stamp office did not relate to the period of the uttering.

R. Hall, for the prisoner.—I submit, first, that, it is not proved that Henry Dresser was one of the public officers of the Yorkshire District Bank; and, secondly, that, in the case of a company acting under the stat. 7 Geo. 4, c. 46, it is not allowable to lay the intent to be to defraud one of the partners “and others.” In the case of *Steward v. Greaves*, 10 M. & W. 711, it was held, that the 9th section of the stat. 7 Geo. 4, c. 46, was imperative in cases of civil proceedings, and that a creditor of one of these companies could only sue one of the public officers of the company; and Baron PARKE, in giving judgment, said, that the words of the 9th section of the stat. 7 Geo. 4, c. 46, that, “all actions against the copartnership *shall and lawfully may*” be commenced against one of the public officers, are obligatory. The same words “shall and may” are applied to cases of indictments; and, further, from the preamble of the 14th section of the *stat. 7 Geo. 4, c. 64, it appears, that the laying an intent to defraud one partner and “others” only applies to cases where it would have been necessary to have named all the partners. Thirdly, I submit, that the forged instrument is improperly described as an order for the payment of money, as it does not upon the face of it purport to be an order; neither is it shown that the party whose name was forged had any authority to order the payment. [743]

COLERIDGE, J., overruled the objections, and reserved the case for the opinion of the fifteen Judges. Verdict—Guilty.

Bliss and *Blanshard*, for the prosecution.

R. Hall, for the prisoner.

Before Lord DENMAN, C. J.; TINDAL, C. J.; POLLOCK, C. B.; PARKE, B.; PATTESON, J.; COLERIDGE, J.; COLTMAN, J.; ROLFE, B.; CRESSWELL, J.; ERLE, J.; and PLATT, B.

R. Hall, for the prisoner.—On the third point in this case, I submit, that this instrument was not properly described as an order for the payment of money. An order must involve a breach of duty, if the person to whom it is addressed disobeys it; and an instrument may be a warrant for the payment of money, although it is not an order. A warrant is that which the person to whom it is addressed might avail himself of in settling the account, and this does not depend on the accidental form of expression used in the instrument, but on its legal effect. The recent cases of *Regina v. Roberts*, C. & Mar. 652; *Regina v. Gilchrist*, Ibid. 224; *Regina v. Raake*, 8 C. & P. 626, (b) are authorities on this *subject. An instrument may be an order, though in the most precatory terms; but I submit, that it would not be an order unless there were funds in the hands of the drawee. [744]

Lord DENMAN, C. J.—Writing to a man, “Please to pay” so and so, rather assumes that there are funds.

PARKE, B.—This instrument is like a check on a banker, and saying “Please to pay” is only being very civil to your banker.

R. Hall.—I submit, that it is no order if there were no funds.

(a) See Sched. (A.) of the stat. 7 Geo. 4, c. 46.

(b) See also the case of *Regina v. Vivian*, ante, p. 719.

indictment, and, accordingly, a fresh bill was prepared and found by the grand jury against the defendant at the Durham Assizes in July, 1843.

Archbold, (with whom was *Hindmarsh*,) for the prosecution, proposed to try the prisoner upon the second indictment.

R. Matthews, for the prisoner, objected, that the defendant appeared in *731] pursuance of his recognisance, and *traversed to the first indictment, and was, therefore, entitled to have the first indictment tried or disposed of before he was tried on the second.

WIGHTMAN, J., held, that the defendant was entitled to have the first indictment disposed of before he could be tried on the second.

Archbold then proposed to enter a *nolle prosequi* upon the first indictment, but

WIGHTMAN, J., held, that a *nolle prosequi* could only be entered by the authority of the attorney-general.

Archbold then moved to quash the former indictment, upon the ground of defects apparent on the face of it.

R. Matthews, for the defendant, admitted that the first indictment was bad, but submitted, that the defendant was entitled to be tried upon it, so that he might have the benefit of a plea of *autrefois acquit* or *autrefois convict*, upon the trial of the second indictment; and that, at all events, the prosecutor could not be permitted to have the first indictment quashed, except upon the terms of paying the defendant's costs.

WIGHTMAN, J., said, that the defendant was not entitled as of right to be tried on the defective indictment, and that he could not derive any benefit from such a trial, and that the first indictment should be quashed; but that, if the defendant would at once go to trial upon the second indictment, without traversing to the next assizes, the indictment should only be quashed upon the terms of the prosecutor paying to the defendant the costs of the traverse and recognisance. (a)

*732] *The amount of the costs was at once determined by the clerk of the crown for the county palatine, and paid to the defendant, upon which the first indictment was quashed, and the defendant was immediately tried upon the second indictment.

The indictment upon which the defendant was then tried, alleged, that a certain action for a certain debt and demand was depending in the Queen's Court of Pleas at Durham, whereby one John Nicholson was plaintiff, and one Francis Snaith, defendant, wherein the sum sought to be recovered did not exceed 20*l.*; and that before Edward Shepperdson, Esq., then and still being sheriff of the county of Durham, a certain issue before then joined in the said action came on to be tried, and was, by virtue and in pursuance of a writ of our lady the queen, duly tried before the said Edward Shepperdson, Esq., then being such sheriff as aforesaid, and by a jury of the said county. It then stated, that the defendant was produced as a witness, and was sworn before the said Edward Shepperdson, Esq., so then and there being such sheriff as aforesaid, the said Edward Shepperdson, Esq., having competent authority to administer the oath, and that, being so sworn, the defendant falsely, &c., before the jurors so sworn to try the said issue, and before the said Edward Shepperdson, Esq., so then and there being such sheriff as aforesaid, did depose and swear, &c. [setting out the evidence given by the present defendant, which was to the

(a) See the cases of *Rex v. Webb*, 3 Burr. 1468; *Rex v. Wynn*, 2 East, 226; and *Rex v. Glenn*, 3 B. & Ald. 373.

effect, that the present defendant saw the original defendant pay the debt to the plaintiff in the action, and assigned perjury upon it.](a)

*On the part of the prosecution, the writ of trial in the action of *Nicholson v. Snaith* (in the Court of Pleas at *Durham) was given [*733 in evidence with the postea endorsed, from which it appeared that [*734

(a) The indictment was in the following form:—"The jurors, &c., upon their oath, present, that heretofore, to wit, on the 8th day of March, in the sixth year of the reign of our said lady the queen, a certain action of debt for a certain debt and demand was depending in the court of our said lady the queen before her justices at Durham, that is to say, in our said lady the Queen's Court of Pleas at Durham, wherein one John Nicholson was plaintiff, and one Francis Snaith was defendant, and wherein the sum of money sought to be recovered, and endorsed on the writ of summons, did not exceed £20; and that heretofore, to wit, on the said 8th day of March, in the year aforesaid, at the parish of St. Aswald, in the county of Durham, before Edward Shepperdson, Esq., then and still being sheriff of the said county of Durham, a certain issue before then joined between the said John Nicholson and Francis Snaith, in the said action, came on to be tried in due form of law, and according to the form of the statute in such case made and provided, and was then and there, by virtue and in pursuance of a writ of our said lady the queen, directed to the said sheriff of the said county of Durham in that behalf, in due form of law, and according to the form of the statute in such case made and provided, duly tried before the said Edward Shepperdson, Esq., so then being such sheriff as aforesaid, and by a jury of the said county of Durham, in that behalf duly summoned, taken, and sworn between the parties aforesaid.

"And that, upon the said trial of the said issue, one William Dunn, late of the parish of St. Aswald, in the said county of Durham, labourer, then and there appeared, and was produced as a witness for and on behalf of the said Francis Snaith, and was then and there duly sworn, and took his corporal oath upon the holy Gospel of God, before the said Edward Shepperdson, so then and there being such sheriff as aforesaid, that the evidence which he the said William Dunn should give to the said sheriff and to the said jury so sworn as aforesaid, touching the matter in question between the said parties, should be the truth, the whole truth, and nothing but the truth, (he the said Edward Shepperdson so then and there being such sheriff as aforesaid, and then and there having sufficient and competent authority to administer the said oath to the said William Dunn in that behalf;) and that, at and upon the said trial of the said issue so joined between the said parties as aforesaid, to wit, on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, it then and there became and was a material question, whether the said Francis Snaith had paid to the said John Nicholson divers, or any, sums or sum of money, in the whole amounting to a large sum of money, to wit, the sum of 9l. 18s. 6d., in full satisfaction of a certain sum of money, to wit, the sum of 9l. 18s. 6d., theretofore due and owing from the said Francis Snaith to the said John Nicholson, and also whether the said Francis Snaith had paid or delivered to the said John Nicholson any sum or sums of money, or any promissory note or promissory notes in payment or satisfaction, or in part payment or satisfaction, of a certain sum of money, to wit, the sum of 9l. 18s. 6d., theretofore due and owing from the said Francis Snaith to the said John Nicholson.

"And that the said William Dunn, having been sworn as aforesaid, not having the fear of God before his eyes, not regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to prevent the due course of law and justice, and unjustly to aggrieve the said John Nicholson, the said plaintiff in the said action, and to deprive him of the benefit of the said suit then in question, and to subject him to the payment of sundry heavy costs, charges, and expenses, then and there on the said trial of the said issue, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said jurors so sworn to try the said issue as aforesaid, and before the said Edward Shepperdson, Esq., so then and there being such sheriff as aforesaid, did depose and swear (amongst other things) in substance and to the effect following; (that is to say.)

"I saw Snaith's wife bring out some money and give it to her husband, (thereby meaning that the said Wm. Dunn had seen the wife of the said Francis Snaith bring out some money, and give it to the said Francis Snaith, her husband;) Snaith took the £5 note, and laid it on the table, (thereby meaning that the said Francis Snaith took a promissory note for the payment of £5, and laid it on a table,) shoved it along, (thereby meaning that the said Francis Snaith shoved a promissory note for the payment of £5 along a certain table to the said J. Nicholson,) and said to Nicholson, (thereby meaning that the said F. Snaith said to the said J. Nicholson,) "Look at that," (meaning

actual resistance; and I submit, that insensibility is contradictory in terms to the definition of rape, as the definition of rape implies will, and the exercise of it. In cases of robbery, as distinguished from larceny, the offence must be against the will of the person robbed; thus a person would not be guilty of robbery by taking goods from a person asleep. The cases of *Rez v. Jackson*, R. & R., C. C. 487, *Regina v. Saunders*, 8 C. & P. 265, *Regina v. Williams*, Id. 286, are all authorities to show, *48] that, if a man by fraud has "connection with a married woman, she believing him to be her husband, and therefore consenting to the connection, this is not rape.

PATTESON, J.—If a man came behind a woman and gave her a blow on the head, and made her insensible, that, according to your doctrine, is no rape, because resistance and will are out of the question.

ALDERSON, B.—In cases of fraud the woman is a willing agent, although her will is influenced by the fraud; but in the case put by my brother PATTESON there is force. In that case resistance would be impossible, from a blow given by the prisoner. In the present case, it was rendered impossible by the liquor he gave.

Ballantine.—In the case of *Regina v. Stanton*, ante, p. 415, Mr. Justice COLERIDGE took the distinction between an assault with intent to commit a rape, and an intention to have intercourse with the prosecutrix by surprise; and so the enactments on the 16th and 17th sections of the statute 9 Geo. 4, c. 31, as to abusing female children, go to show, that, if there is no resistance, the offence of rape is not committed.

ALDERSON, B.—If a woman was fainting at the time, what would you say then?

Ballantine.—I should fall back on the definition "against her will." I should draw the distinction between robbing by force, and picking a person's pocket when he did not know it.

ERLE, J.—Larceny and robbery are both committed *invito domino*.

*749] Lord DENMAN, C. J.—It is against the general and permanent will of the party to have his pocket picked.

ALDERSON, B.—And so may a woman have a general will not to be ravished. Was there not a case in Ireland, of a lady who had laudanum given to her, and who was ravished while in a state of insensibility? What became of that case?

Ballantine.—In that case the prisoner was condemned and afterwards transported; but in that case the jury found that the prisoner had intended to ravish her at all events. The finding of the jury here is different. I submit, that, as it is neither shown that the prisoner used force, nor that the prosecutrix exercised any resistance, the offence of rape is not committed.

Lord DENMAN, C. J.—It is put as if resistance was essential to a rape; but that is not so, although proof of resistance may be strong evidence in the case.

The case was considered by the judges, and PATTESON, J., delivered judgment as follows:—

"Wm. Camplin, you have been found guilty of the offence of rape, by the jury before whom your trial took place; but, from some circumstances which appeared upon that trial, the learned judge desired to have the opinion of his brethren, her majesty's judges, whether the offence was

complete in point of law. It appeared upon the evidence that the young woman, upon whose person the offence was committed, refused her consent so long as she had sense or power to express such want of consent; but that you made her quite insensible by administering liquor to her, and whilst she was in a state of insensibility took advantage of it, and violated her person; and the only ground *upon which any doubt could [*750 possibly arise on this state of facts was, that the jury found that you gave her the liquor for the purpose of exciting her, and then having sexual intercourse with her, and not for the purpose of rendering her insensible. It is my duty to inform you, that, after hearing counsel on your behalf, a great majority of the judges are of opinion that the evidence that the rape was committed without the consent and against the will of the prosecutrix was sufficient, and that, consequently, the offence has been completely proved. The prosecutrix showed by her words and conduct, up to the very latest moment at which she had sense or power to express her will, that it was against her will that intercourse should take place. And it was by your illegal act alone, that of administering liquor to her, to excite her to consent to your unlawful desires, that she was deprived of the power of continuing to express such want of consent. Whatever your original intention was in giving her the liquor, you knew that it was calculated in its natural consequences to make her insensible, and you know also that it had produced that effect upon her at the time you took advantage of her insensibility. Your case, therefore, falls within the description of those cases in which force and violence constitute the crime, but in which fraud is held to supply the want of both. I have, therefore, the duty cast upon me of pronouncing the sentence of the law, which is, that you be transported beyond the seas for the complete term of your natural life."

*PROMOTIONS.

[*751

IN Hilary Term, 1845, *T. J. Platt*, Esq., was appointed a Baron of the Exchequer, *vice* Baron GURNEY resigned.

In the vacation after Hilary Term, 1845, Mr. Serjeant *Manning* and Mr. Serjeant *Channel* received patents of precedence.

In the same vacation, *W. Lee*, Esq., *L. C. Humfrey*, Esq., *J. B. Parry*, Esq., *W. P. Wood*, Esq., *R. Gurney*, Esq., *W. M. Butt*, Esq., and *A. Hayward*, Esq., were appointed her majesty's counsel learned in the law.

1892

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TO

THE PRINCIPAL MATTERS.

Gill as per

ABATEMENT (PLEA IN.)

See PLEADING, 4.

ABDUCTION.

1. A., a girl under sixteen, who was in service, was, as she was returning from an errand, asked by B. if she would go to London, as B.'s mother wanted a servant, and would give her £5 wages. A. and B. went away together to Bilton where both were found, and B. apprehended:—*Held*, that this was not such a *taking* or *causing to be taken* of A. as was sufficient to constitute the offence of abduction under the 20th sect. of the stat. 9 Geo. 4, c. 31. *Reg. v. Meadows.* 399
2. Semble, that a mere fraudulent decoying or enticement away of a girl under sixteen is not a taking or causing to be taken within that section. *Ibid.*
3. A. went in the night to the house of B., and placed a ladder against a window, and held it for J., the daughter of B., to descend, which she did, and then eloped with A. J. was a girl under sixteen, viz. fifteen years old:—*Held*, that this was a "taking" of J. out of the possession of her father within the stat. 9 Geo. 4, c. 31, s. 20, although J. had herself proposed to A. to bring the ladder and to elope with him. *Held*, also, that it was no defence for A., that he did not know that J. was under sixteen, or that from her appearance he might have thought she was of a greater age. *Reg. v. Robins.* 456

ABUSING FEMALE CHILDREN.

See RAPE, 1.

If, on the trial of an indictment for a misdemeanour in carnally knowing and abusing a girl between the ages of ten and twelve, it appears that the defendant effected his purpose by force, and against the girl's will, this is no ground of acquittal. *Reg. v. Neale.* 591

ACCESSARY.

Three persons were *jointly* charged with procuring certain other persons to utter a forged will. The only evidence for the prosecution was of *separate acts*, at separate times and places, done by each of the persons charged as accessories. At the end of that evidence one of them pleaded guilty:—*Held*, that the other two might,

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1. An action for goods sold and delivered had been brought against three, who pleaded in abatement the non-joinder of P. and four other persons. The plaintiff did not take issue on that plea, and brought another action against the eight, in which P. pleaded, separately, non assumpsit. At the trial, the counsel for two of the original defendants, in his address to the jury, proposed to go into evidence to prove that one of them was not liable, and also to prove, under the stat. 3 & 4 Will. 4, c. 42, s. 10, that P. was liable. P.'s counsel asked to be allowed to address the jury after the proposed evidence was given, instead of before, and it was held that he might do so. *Beale v. Mowle.* 1
2. In an action for a conspiracy, the defendants pleaded the general issue, and also a special plea of justification, which plea was demurred to, and held bad by the court, who gave judgment on it for the plaintiff, and the award of venire was as well to try the issue joined "as to inquire what damages the said plaintiff had sustained on occasion of the premises whereof the court hath given judgment for the said plaintiff:?"—*Held*, that, on the trial at Nisi Prius, the defendants' counsel, in addressing the jury, had a right to refer to the allegations contained in the special plea, and to comment upon them. *Gregory v. Duke of Brunswick.* 24
3. Where the counsel for several prisoners cannot agree as to the order in which they are to address the jury, the court will call upon them, not in the order of their seniority, but in the order in which the names of the prisoners stand in the indictment. But where the counsel for one prisoner has witnesses to fact to examine, the counsel for another cannot be allowed to postpone his address to the

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AGENT.

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1. A was the owner of a saw-mill, and B. was his foreman. B., as the agent of A., but without any express authority, entered into a contract in writing to supply C. with a quantity of Scotch-fir staves:—*Held*, that this contract was binding on A., inasmuch as B. must be presumed to have had a general authority to enter into such contracts as the one in question. *Richardson v. Cartwright.* 328

2. An agent has no right, without the authority of his principal, to overdraw a banking account. But if it appear that the agent has done so without the knowledge of his principal, the jury will be warranted in inferring from this, that the agent had, in fact, the requisite authority. *Polt v. Bevan.* 335

3. In debt against an executor for a legacy, which, it was alleged, he was, by agreement with the legatee, to retain and to pay interest upon, the defendant pleaded the Statute of Limitations. It was proposed to take the case out of the Statute of Limitations, by putting in letters written by the defendant's son, who assisted him in his trade, and received for him money due to him in the way of his business as a shoe manufacturer:—*Held*, that, though this would be good evidence to show that the son was his father's agent in matters relating to the father's trade, it was not such evidence of agency as would render the letters of the son admissible in evidence in this case. *Whitehouse v. Aberley.* 642

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1. In an action for wrongfully dismissing the editor of a periodical work within the year for which he was alleged to be engaged, the declaration stated that the plaintiff was engaged for a year, at a salary of three guineas per week, to be raised one guinea for every thousand copies sold. It was objected that the terms of the contract, as to the rise of salary, were not proved. The judge, being of opinion that there was some evidence of the contract as laid, left the case to the jury, and said, that, if they found that the contract was not on the terms as to salary which were alleged in the declaration, he should not allow an amendment, but would have the finding of the jury stated on the record, under the stat. 3 & 4 Will. 4, c. 42, s. 24. *Baxter v. Nurse.* 10

2. Where a plaintiff had obtained from a judge at chambers an order for leave to amend his declaration on payment of costs, but had not made the amendment, the judge who tried the cause refused to allow the declaration to be amended at the trial, under the 3 & 4 Will. 4, c. 42, s. 23. *Geeckie v. Monck.* 555

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ARSON.

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1. On an indictment on sect. 2 of the stat. 7 Will. 4 & 1 Vict., c. 89, for the capital offence of setting fire to a dwelling-house, some person being therein, (the indictment not charging any intent to injure or defraud any person,) the prisoner cannot

- be convicted of the transportable offence of setting fire to the house, under sect. 3 of that statute, as an allegation of an intent to injure or defraud some person is essential to an indictment under sect. 3 of that statute. *Reg. v. Paice* 73
2. A. was indicted for setting fire to an out-house. The building set on fire was a pig-stye, situate in a yard in the possession of the prosecutor, into which yard the back-door of the prosecutor's house opened, and which yard was bounded by fences and by other buildings of the prosecutor, and by a cottage and barn, which were let by the prosecutor to a tenant, but which did not open into his yard:—*Held*, that this pig-stye was an out-house within the stat. 1 Vict., c. 89, s. 3. *Reg. v. James*. 303
3. A building erected not for habitation, but for workmen to take their meals and dry their clothes in, which has four walls, a roof, a door, but no window, but in which a person slept with the knowledge, but without the permission, of the owner, is not a "house," the setting fire to which is felony, within the stat. 1 Vict., c. 89, s. 3. *Reg. v. England*. 533

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1. M. was delivered of a child at the house at which A. and B. resided, they telling her that the child was to be taken to an institution to be nursed. A. and B. took the child from the house, and put it into a bag, and hung the bag, with the child in it, on some park palings at the side of a foot-path, and there left it:—*Held*, that this was an assault on the child. *Reg. v. March*. 496
2. On an indictment for feloniously wounding, with intent to do grievous bodily harm, some of the prisoners may be convicted of the felony, and another of them of an assault, under the 11th sect. of the stat. 7 Will. 4 & 1 Vict., c. 85. *Reg. v. Archer*. 174
3. A. was indicted for administering poison to B., with intent to murder her. A. took a tea-pot and tea-cup into B.'s bed-room, and left it there, and B. afterwards helped herself to a cup of the tea which contained the poison. The jury found A. guilty of administering the poison, but not with intent to murder:—*Held*, that the offence of administering poison in this manner, with intent to murder, was not one in which the "crime charged" includes an assault within the stat. 7 Will. 4 & 1 Vict., c. 85, s. 11. *Reg. v. Draper*. 176
4. A policeman prevented a member of a society from entering the society's room:—*Held*, that, if the policeman was wholly passive, and merely obstructed his entrance as any inanimate object would,

this was not an assault by the policeman. *Innes v. Wylie*. 257

5. An assault made by a man in defence of his property is justifiable. *Alderson v. Waistell*. 358
6. Where A. threw a stick, which struck the plaintiff, but it did not appear for what purpose the stick was thrown—*Held*, that it was fair to conclude that the stick was thrown for a proper purpose, and that the striking of the plaintiff was an accident. *Ibid*.
7. On an indictment for an assault with intent to commit a rape, the prosecutrix stated, that the defendant, her medical man, being in her bed-room, directed her to lean forward on a bed, that he might apply an injection: she did so, and the injection having been applied, she found the defendant was proceeding to have a criminal connexion with her, upon which she instantly raised herself up, and ran out of the room. She stated that the defendant had penetrated her person "a little":—*Held*, that, if it had appeared that the defendant had intended to have had a criminal connexion with the prosecutrix by force, the complete offence of rape would, upon this evidence, have been proved, but that the thus getting possession of the person of the woman by surprise was not an assault with intent to commit a rape, but was an assault. *Reg. v. Stanton*. 415
8. On an indictment for manslaughter by beating, it appeared that the deceased had died of a dislocation of the vertebrae two days after fighting with the prisoner:—*Held*, that, if the jury were not satisfied that the death of the deceased was caused by the prisoner, they might find the prisoner guilty of an assault under the stat. 1 Vict. c. 85, and that, with a view to a conviction on that statute, it was immaterial that the deceased was the challenger in the fight, and that it did not appear which party struck the first blow. *Reg. v. Lewis*. 419
9. If two parties got out to strike one another, and do so, it is an assault in both, and it is quite immaterial which strikes the first blow. *Ibid*.
10. It is an assault to point a loaded pistol at any one; but not an assault to point a pistol at another which is proved not to be so loaded as to be able to be discharged. *Reg. v. James*. 530

ASSAULT WITH INTENT TO COMMIT RAPE.

See ASSAULT, 7.

ASSAULT WITH INTENT TO ROB.

1. A. and B., on a concerted plan obtain money from C., threatened to accuse him of an indecent exposure of his person, and A. (B. being present) seized C. by the collar, and A. and C. went to a station-house, and there A. made the threatened charge:—*Held*, that, on these facts, A. and B. might be convicted of an assault

with intent to rob C., although the threats used did not come within the terms of the stat. 7 & 8 Geo. 4, c. 29, ss. 7 and 9, or of the stat. 7 Will. 4 and 1 Vict., c. 87, s. 4. *Reg. v. Stringer.* 188

- 2 A., at C. fair, came up to B., the prosecutor's father, (being a stranger to him,) and gave him eleven sovereigns to buy him a horse, and B. put them into his pocket. B. refused to give the eleven sovereigns back, and A. and the prisoner, who was in his company, assaulted him, but could not get the money from him. On the next day the prisoner asked B. for the eleven sovereigns; and at L. fair, on a subsequent day, the prisoner having seen the prosecutor receive seven sovereigns, demanded the eleven sovereigns of him, and then knocked him down, and tried to get the seven sovereigns out of his pocket:—*Held*, that there was such a semblance of a claim of right, that this was not an assault with intent to rob. *Held*, also, that, the intent to rob being negatived, the prisoner might be convicted of an assault under the 11th sect. of the stat. 1 Vict., c. 85. *Reg. v. Boden.* 395

ASSISTANT.

See PUPIL AND ASSISTANT.

ATTEMPT TO MURDER.

See ASSAULT, 1, 3.

ATTEMPTING TO ADMINISTER POISON.

1. The delivery of poison to an agent, with directions to him to cause it to be administered to another under such circumstances, that, if administered, the agent would be the sole principal felon, is not an "attempt to administer poison," within the stat. 1 Vict., c. 85, s. 3. *Reg. v. Williams.* 589
2. A. delivered poison to B., and desired him to put it into V.'s beer, for that he (A.) wanted to kill V. B. delivered the poison to V., and told him what had passed between A. and himself:—*Held*, that A. could not be convicted on the stat. 1 Vict., c. 85, s. 3, of having attempted to administer poison to V. *Ibid.*

ATTEMPTING TO DISCHARGE LOADED ARMS.

See ASSAULT, 10. SHOOTING, 3.

ATTORNEY.

See EVIDENCE, 4.—POWER OF ATTORNEY.

In *assumpsit* against an attorney for negligence, the fact of his having been retained as an attorney is put in issue by the plea of *non assumpsit*. *Aldis v. Gardner.* 564

ATTORNEY-GENERAL.

See REPLY.

AWARD.

Where three arbitrators were appointed, with power to any two of them to make their award, and the award was afterwards made as the award of the three, but it was executed by two only—*Held*,

that the power was well executed. *White v. Sharp.* 348

BANKER.

See INTEREST.

BANK (JOINT-STOCK.)

See FORGERY, 8, 9.

BANKRUPT.

See EVIDENCE, 23. INTEREST.

BANKRUPT.

1. An indictment against a bankrupt, on the 112th sect. of the Bankrupt Act, 6 Geo. 4, c. 16, for not surrendering on the forty-second day, is bad, if it does not allege that he had an intent to defraud his creditors. The words "with intent to defraud his creditors" apply to all the offences under that section. *Reg. v. Hill.* 168
2. Where a petitioning creditor's debt consists of a certain principal sum and interest, but, by reason of its insufficiency, another debt is substituted for it under the 6 Geo. 4, c. 16, s. 18, it is sufficient to constitute such second debt a debt "not anterior" to the former, that the principal sum was due before the accruing of the substituted debt, although the interest thereon may have been accruing up to a period subsequent thereto. *Fletcher v. Manning.* 350
3. The proof of a petitioning creditor's debt may be received in evidence, without its having been enrolled, provided the handwriting of the petitioning creditor be proved, and the deposition be produced from the original proceedings under the fiat. *Ibid.*
4. Where a mill, and the machinery therein, had been mortgaged, and the mortgagor continued in possession until the time of his bankruptcy:—*Held*, that the machinery was not in the order and disposition of the bankrupt, within the meaning of the bankrupt acts. *Ibid.*
5. *Semble*, that, where a creditor proves under a fiat in bankruptcy for a debt due on bills of exchange of which the bankrupt is the drawer, it is not necessary for him to aver in his deposition that the bills were duly presented, and that notice of their dishonour was given to the bankrupt. *Ibid.*
6. A., a trader, on the 2d of October, gave B., one of his creditors, an order for money drawn by a board of guardians of the poor on their treasurer, payable to A., but not to bearer or order. On the 4th of October, A. committed an act of bankruptcy, of which B. had notice on the 5th. On the 9th, the treasurer of the union paid B. the amount of the order. A fiat in bankruptcy issued against A. on the 22d of November:—*Held*, that A.'s assignees could not recover the amount of the order in an action for money had and received by B., as this was a "transaction" protected by the stat. 2 & 3 Vict., c. 29, s. 1, and that the "transaction" was, so far as the bankrupt was concerned,

complete on the 2d of October. *Green v. Bradfield.* 449

7. To determine whether a fraudulent preference has been given by a bankrupt to one of his creditors by a payment, it will be for the jury to say whether the payment was voluntary, and without any pressure by the creditor, and was made when the debtor knew that he must be a bankrupt, and in contemplation of bankruptcy. *Ibid.*

8. In order to constitute "pressure," it is not necessary that legal proceedings should have been resorted to; for, if the pressure was such that it overweighed the bankrupt's own inclination, and induced him to pay against his will, that would be sufficient pressure within the meaning of the bankrupt laws. *Ibid.*

9. From a person being in embarrassed circumstances, it does not necessarily follow that he contemplates bankruptcy, as he may hope that his affairs may rally and come round. *Ibid.*

10. A bankrupt, after the issuing of the fiat against him, but before the granting of his certificate, promised in writing to pay a debt due by him before his bankruptcy:—*Held*, that this promise did not revive the debt, so as to enable the creditor to sue the bankrupt thereon in an action of *indebitatus assumpsit*. *Kirkpatrick v. Tattersall.* 577, 752

BANKRUPT (SCOTLAND.)

1. Where the property of a deceased debtor has been sequestrated under the Scotch Bankrupt Act, 2 & 3 Vict., c. 41, the title of the trustee under the sequestration is made out by proof of the "act and warrant," in the manner prescribed by the 48th section of that statute, whether the property of the deceased debtor was subject to the Scotch bankrupt laws or not; and, *semble*, that, in an action by such trustee, the defendant cannot, after such proof, impeach the trustee's title, the only mode of doing so being by application in the Scotch courts. *Miller v. Kerr.* 38
2. The property of a deceased debtor, who, at the time of his death, resided or had a dwelling-house, or carried on business in Scotland, and was at that time owner of heritable or moveable estates in Scotland, is liable to the Scotch Bankrupt Act, 2 & 3 Vict., c. 41; and it is not necessary that the deceased debtor should have been a trader, and the amount of his heritable or moveable estate in Scotland at the time of his death is immaterial. *Ibid.*

BARON AND FEME.
See HUSBAND AND WIFE.

BEGIN (RIGHT TO.)
See RIGHT TO BEGIN.

BESTIALITY.
See INDICTMENT, 2.

BIGAMY.

See FOREIGN LAWS (PROOF OF.)

1. On an indictment for bigamy, it was *held*

not to be essential that a witness, who was called to prove the law of Scotland as to marriage, should be at all connected with the legal profession; and the evidence of a gentleman, who stated that he was born and educated in Scotland, and lived there till he was twenty years old, and that he was acquainted with the law of marriage in Scotland, was held to be sufficient for this purpose; but that decision is expressly overruled in the *Sussex Peerage Case. Reg. v. Dent.* 97, 751

2. A., a married woman, in the lifetime of her husband, married B., who was a widower, B. having been the husband of A.'s deceased sister:—*Held*, that this was bigamy in A., and that the circumstance, that the marriage of A. and B. would have been wholly void under the stat. 5 & 6 Will. 4, c. 54, s. 2, even if A. had been an unmarried person, made no difference. *Held* also, that, if B. knew at the time of his marriage with A., that she was a married woman, he might be convicted of the felony of counselling A. to commit bigamy. *Reg. v. Brown.* 144

3. If an indictment for bigamy be tried at the same assizes at which the bill is found, it will sufficiently appear by the caption of the indictment, that the party is in custody in the county, so as to give the court jurisdiction under the stat. 9 Geo. 4, c. 31, s. 22, and there need not, in that case, be any averment in the indictment as to the custody. *Reg. v. Whaley.* 150

4. On an indictment for bigamy, the first marriage may be proved by the admissions of the prisoner; and it is for the jury to determine whether what he said was an admission that he had been legally married according to the law of the country where the marriage was solemnized. *Reg. v. Simmonato.* 164

BILL OF EXCEPTIONS.

Where, at the trial of a cause, the counsel for the defendant had tendered a bill of exceptions, the judge, on a verdict being found for the plaintiff, at first refused to certify for speedy execution, but afterwards did so. *Dresser v. Clarke.* 569, 752

BILL OF EXCHANGE.

See EVIDENCE, 2. EXECUTORS AND ADMINISTRATORS, 4.

1. A paper, signed by the defendant, was in the following form:—"I. O. U., £53, to be paid May 5:"—*Held*, that this was a promissory note, and required a stamp. *Waithman v. Elsee.* 35
2. To prove notice of dishonour of a bill of exchange for £53, dated December 19, 1842, evidence was given that a letter was sent to the defendant, asking payment of 53l. 6s. 6d., "due on your dishonoured note dated 19th December last" [1842:]—*Held*, to be a sufficient notice of dishonour, although the instrument dishonoured was a bill, and not a note, and was for £53, and not 53l. 6s. 6d., unless it appeared that there was some other instrument to which

- the notice could apply, and that the proof of the existence of such other instrument lay on the defendant. *Stockman v. Parr.* 41
3. A paper writing, in the following form:—
“On demand, I promise to pay to W. S. the sum of £50, in consideration of foregoing and forbearing an action at law in the Court of Queen’s Bench, for damages ascertained, by consent, to amount to that sum, by reason of the injury sustained by his wife, in respect of my liability for non-repair of a footway, in the parish of S. (Signed) T. I.”—is a promissory note. *Shenon v. James.* 136
4. A bill directed in blank may be accepted by anybody, and be a good bill; but, if directed to a particular person, it cannot be accepted by any other person, except for honour. *Davis v. Clarke.* 177
5. Where, after a bill has been accepted, and before it is delivered to the drawer, an alteration is made by a third party in the date thereof, it is for the jury to say,—judging from all the circumstances of the case,—whether such third party made the alteration in question with the acceptor’s consent, or as his agent; and in either case the acceptor will be liable. *Whitfield v. Collingwood.* 325
6. Where the drawer of a bill of exchange has had no notice of the dishonour thereof, but has subsequently promised to pay it:—*Seemle*, that such promise does not admit the notice, but merely waives it. *Chapman v. Annett.* 552
7. In an action against the endorser of a bill of exchange, a memorandum in writing, made by the defendant’s wife, of the receipt of notice of dishonour at the place from which the bill was dated, (the defendant himself not having been resident there at the time,) is admissible, after the death of the wife, to prove that the defendant had due notice of dishonour. *Wharton v. Wright.* 565
- BOUGHT AND SOLD NOTES.**
1. Where, on a sale of goods, bought and sold notes are given, the bought and sold notes constitute the contract between the parties, and not the entry of the contract made by the broker in his book. But, if there be no bought and sold notes, the entry in the broker’s book may be resorted to. *Townend v. Drakeford.* 20
2. If there be a material discrepancy between the bought and sold notes, there is no contract. *Ibid.*
3. Where the bought note of 405 chests of India sealing-wax contained the terms, “Prompt 25th June, brokerage 1 per cent., deposit 15l. per cent., payable 2d April,” and the sold note was, “Prompt 25th June, brokerage $\frac{1}{2}$ per cent.,” and the deposit wholly omitted:—*Held*, that this was such a discrepancy between the bought and sold notes as to make it no contract, although, with respect to the brokerage, it was stated by *vers* of the special jury, that the buyer would pay the broker 1 per cent., and the seller $\frac{1}{2}$ per cent. *Ibid.*
4. Whether the signing of bought and sold notes by the clerk of the broker is sufficient, *quære.* *Townend v. Drakeford.* 20
- BREACH OF PROMISE OF MARRIAGE.**
- See RIGHT TO BEGIN, 3.*
- Form of plea, that the parties agreed to exonerate each other from a promise of marriage. 148
- BREAKING INTO A SHOP.**
- A person who breaks into a blacksmith’s shop, and steals goods there, may be convicted of breaking into a shop, and stealing goods, under the stat. 7 & 8 Geo. 4, c. 29, s. 15. *Reg. v. Carter.* 173
- BROKER.**
- See BOUGHT AND SOLD NOTES. CHARTER-PARTY, 2, 3.*
- BURGLARY.**
- An indictment for burglary charged the prisoner with breaking, in the night-time, into the dwelling-house of E. B., “with intent the goods and chattels in the same dwelling-house then and there being, feloniously and burglariously to steal, and stealing the goods of E. B.” It was proved that the house was that of E. B., but that the goods the prisoner stole were the joint property of E. B. and two others:—*Held*, that, if it was proved that the prisoner broke into the house of E. B. with intent to steal the goods there generally, that would be sufficient to sustain the charge of burglary contained in the indictment, without proof of an intent to steal the goods of the particular person whose goods the indictment charged that he did steal. *Reg. v. Clarke.* 421
- BURNING.**
- See ARSON.*
- CALICO PRINTERS.**
- See TROVER, 5.*
- CATTLE.**
- See CRUELTY TO ANIMALS. MAIMING CATTLE. WOUNDING CATTLE.*
- CATTLE IMPOUNDED.**
- See CRUELTY TO ANIMALS.*
- CAUSES (ENTERING FOR TRIAL.)**
- See TRIAL, 3, 4.*
- CERTIFICATE.**
- See PREVIOUS CONVICTION, 1.*
- CERTIFICATE FOR COSTS.**
- See MALICIOUSLY OMITTING TO GIVE NOTICE THAT A JUDGMENT WAS SATISFIED, 2. —TRESPASS, 2.*
- CERTIFICATE FOR COSTS OF DOCUMENTS PROVED.**
- In ejectment by heir against devisee, the heir had given the devisee notice to admit documents wanted to be given in evidence, to show his title as heir. The

devises would not admit them, and the judge at chambers made the usual order as to the costs of proving these documents, whatever was the result of the cause. At the trial the devisee admitted the *prima facie* title of the heir, and the documents were not given in evidence. The defendant established the will, and had a verdict. The judge at the trial held that he could not certify that the documents were proved to his satisfaction, according to the rule of Hilary term, 2 Will. 4, No. 20, to entitle the heir to the costs of bringing witnesses to the trial to prove the documents. *Doe dem. Peters v. Peters.* 279

CERTIFICATE FOR SPEEDY EXECUTION.

See BILL OF EXCEPTIONS.

CHALLENGE OF THE ARRAY.

1. A challenge of the array, stating that the "sheriff has not chosen the panel indifferently and impartially, as he ought to have done, and that the panel is not an indifferent panel," is bad on demurrer as being too general. *Reg. v. Hughes.* 235
2. On the trial at Nisi Prius of an indictment for libel on which only three special jurors appeared, the counsel for the prosecution prayed a tales, and the defendant challenged the array of the tales on the ground that the sheriff was a subscriber to the society who were the prosecutors, and, on issue taken on this challenge, two triers were appointed by the court, who found in favour of the challenge, and the cause was made a remanet. *Reg. v. Dolby.* 238
3. Whether the sheriff, whose array is challenged, is a competent witness to prove his indifferency, *quære.* *Ibid.*

CHARTERPARTY.

1. Where, by the terms of a charterparty, a ship is to proceed to a certain port, and there to load a full cargo for the agents of the freighter, but the freighter has no interest in the outward cargo, his agents are entitled to notice from the captain, that the vessel is ready to receive her homeward cargo; and if no such notice be given, the freighter is not liable for not providing such cargo. *Fairbridge v. Pace.* 317
2. Where A. employs B., a broker, to procure a charter for a ship, and B. employs C., another broker—*Semble*, that evidence of a custom of trade is admissible to show which of the brokers is entitled to be paid the commission by A. *Smith v. Boucher.* 573
3. The body of the charter contained this clause:—"The vessel to be consigned to C. & Co., Liverpool, or to their agents at her port of discharge in the United Kingdom;" and in the margin was the following memorandum: "This charter subject to £5 per cent., payable by the ship."—*Held*, that the jury might infer, from the fact of A. having executed this charter,

an implied contract by him to pay C. his commission. *Smith v. Boucher.* 573

4. By a charterparty it was stipulated that a ship should proceed to Limerick with her then present cargo, and there take a cargo of oats for London, at a freight of 2s. 8d. a quarter; six days being allowed for loading at Limerick. Before the expiration of the six days the freighter's agent offered the captain a cargo at 2s. 6d., and said that the freighter's broker would pay the difference; the captain refused to take anything but according to the terms of the charterparty:—*Held*, that, as the contract had not then been broken by the defendant, the captain was not bound to accept this offer; but that, if the freighter, by putting no cargo on board within the six days, had broken the contract, it was then the captain's duty to take a cargo at the most he could get, so that the damages to be paid by the freighter should be reduced as much as possible. *Harries v. Edmonds.* 693

CHEQUE.

See FORGERY, 10. LARCENY, 15.

CIRCUMCISION.

See EVIDENCE, 11.

COIN.

1. A person was indicted for uttering a counterfeit coin, intended to resemble and pass for "a groat." All the witnesses for the prosecution, except the inspector of coin for the Mint, called it a *fourpenny piece*. The inspector called it a groat, and said he believed that it had had that name from the earliest period. He added, that the original groat of Edw. 3d's reign was larger and heavier than the coin in question; and that, in the Queen's proclamation, these coins were called both groats and fourpenny pieces. The proclamation was not produced, and the inscription on the coin itself was "fourpence."—*Held*, that, if the jury, from their own knowledge of the English language, without considering any evidence at all, were of opinion that a groat and fourpenny piece were the same, the prisoner was rightly indicted, and might be convicted. *Reg. v. Connell.* 190
2. An indictment which charged that the prisoner on, &c., at, &c., feloniously had in his possession a mould, "upon which said mould was made and impressed the figure and apparent resemblance" of the obverse side of a sixpence, was held bad on demurrer, as not sufficiently showing that the impression was on the mould at the time when the prisoner had it in his possession; but a fresh indictment with the words "then and there" before the words "made and impressed" was held good. *Reg. v. Richmond.* 240
3. Where a coining mould is made and impressed to resemble the obverse of a coin which is partly defaced by wear, the indictment should be in the form above mentioned, as the words of s. 10 of the

stat. 2 Will. 4, c. 34, as to moulds to resemble *part* of the obverse of a coin, relate to cases where several moulds put together would make the obverse of the coin. *Reg. v. Richmond.* 240

- ▲ A. was indicted as a principal for feloniously making a die which would impress the resemblance of the obverse side of a shilling. A. had gone to a die-sinker and ordered four dies of the size of a shilling to be made, stating them to be for two whist clubs. One die was to be exactly like the obverse side of a shilling, another with an inscription, a third exactly like the reverse side of a shilling, and the fourth with an inscription. Before making them, the die-sinker communicated with the officers of the Mint, who directed him to execute the prisoner's order, which he did, the prisoner having desired him to make the first and third before he made the other two dies, which he did, and from these counterfeit shillings could be coined:—*Held*, that A. was rightly indicted for the felony as a principal. *Reg. v. Bannen.* 295

COMMENCEMENT OF PROSECUTION.

- On the trial of an indictment on the stat. 9 Geo. 4, c. 69, s. 9, for night poaching, it appeared that the offence was committed on the 12th of January, 1844. The indictment was preferred on the 1st of March, 1845. The warrant of commitment by which the defendant was committed to take his trial for this offence was given in evidence: it was dated on the 11th of December, 1844:—*Held*, that it was sufficiently shown that the prosecution was commenced "within twelve calendar months after the commission" of the offence, within the fourth section of that statute. *Reg. v. Austin.* 621

COMMISSION DAY.

See TRIAL, 3, 4.

COMMISSIONER.

See PERJURY, 4.

COMMITMENT.

See CONVICTION, 2.

CONCEALMENT OF BIRTH.

1. An indictment on the stat. 9 Geo. 4, c. 31, s. 14, for endeavouring to conceal the birth of a dead child, need not state whether the child died before, at, or after its birth. *Reg. v. Coxhead.* 623
2. An indictment for that offence which charges that the defendant did cast and throw the dead body of the child into the soil in a certain privy, "and did *thereby* then and there unlawfully dispose of the dead body of the said child, and endeavour to conceal the birth thereof," sufficiently charges the endeavour to conceal the birth, as the word "thereby" applies to the endeavour as well as to the disposing of the dead body. *Ibid.*
3. If, on the trial of such an indictment, it appear that the body of the child was

found lying on the soil, immediately under the seat of a privy, it is a question for the jury, whether it was thrown there for the purpose of concealment, or whether it came from the mother unawares, when she was there for another purpose; but the judge on such evidence will not stop the case. *Reg. v. Coxhead.* 623

CONFESSION.

1. A prisoner was before a magistrate, on a charge of felony, and, after the examination of the witnesses against him, the magistrate said to him, "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial."—*Held*, that this did not exclude the prisoner's statement from being given in evidence. *Reg. v. Holmes.* 243
2. Several prisoners being in custody on a charge of murder, A., who was one of them, said to the chaplain of the prison, that he wished to see a magistrate, and asked if any proclamation had been made, and any offer of pardon. The chaplain said, that there had, but he hoped that A. would understand that he could offer him no inducement to make any statement, as it must be his own free and voluntary act. When A. saw the magistrate, he said that no person had held out any inducement to him to confess anything, and that what he was about to say was his own free and voluntary act and desire. A. then made a statement to the magistrate:—*Held*, that this statement was receivable against A. on his trial for the murder. *Reg. v. Dingley.* 637
3. Where a prisoner sent for a magistrate to make a statement to him, and the magistrate took down the conversation which passed between him and the prisoner, and wrote it immediately, under the usual heading of a prisoner's statement, and read this over to the prisoner before the prisoner signed his statement, which followed it, the judge directed this memorandum of the conversation to be read before he decided on the admissibility of the statement in evidence, instead of the magistrate stating orally what passed between him and the prisoner. *Ibid.*

CONSPIRACY.

See EVIDENCE, 32.

CONSPIRACY (ACTION FOR.)

See ADDRESSING THE JURY, 2. THEATRE, 1, 2

CONTRACT.

See BOUGHT AND SOLD NOTES. EVIDENCE, 8
PLEADING, 4. TROVER, 3, 4.

1. A., a railway contractor, met B., and several others, in order to receive tenders with reference to certain work. A. then read a specification with reference to the work in question; after which B. and the others handed in their tenders. B.'s tender was signed with his name, but there was no evidence that it was in his handwriting:—*Held*, notwithstanding,

that such tender, taken with the specification, sufficiently proved the contract. *Allen v. Yocall.* 315

2. A., B., and C., who were co-partners, engaged D., by agreement in writing, to serve them for a certain period. Before this period had elapsed, C. retired from the concern, and D., with notice of that fact, continued in the service of A. and B. A. and B. subsequently became bankrupt, whereupon D. was dismissed from their employment:—*Held*, that D. could still sue A., B., and C. on the original agreement. *Dobbin v. Foster.* 323
3. In order to set aside a sale of goods, *quoad* the purchaser, on the ground that it was made with the intention of defrauding the creditors of the seller, it must be shown that the purchaser was aware of that intention, and that he conspired with the seller to carry it into effect. *Bentliff v. Garnett.* 326

CONTRA FORMAM STATUTI.

The alterations made in the law with respect to burglary, by the stat. 7 Will. 4, and 1 Vict., c. 86, as to the hours, and as to the punishment, do not make it necessary for an indictment for that offence to conclude *contra formam statuti*, as the alteration with respect to the hours does not alter the offence, and the mere diminution of the punishment does not make that conclusion necessary. *Reg. v. Polly.* 77

CONVICTION.

See PRAVIOUS CONVICTION.

1. The provisions of the stat. 52 Geo. 3, c. 93, that convictions for sporting without game certificates shall be entered and registered with the commissioners of taxes of the district, and returned to the clerk of the peace, are directory only; and where this has been omitted, the conviction is not therefore void; but the convicting magistrate may be liable for punishment for not complying with the directions of the statute. *Mason v. Barker.* 100
2. *Semble*, that a commitment which recites a conviction by which the plaintiff was adjudged to forfeit £20, which is mitigated to 1*l.* 10*s.*, and 10*s.* added for costs, is supported by proof of a conviction in a penalty of £20, from which the magistrate orders 10*s.* costs to be deducted. *Ibid.*
3. Where, in a conviction, the summons is recited, such recital of it is evidence of the summons; but, in an action against the convicting magistrate for false imprisonment, the plaintiff may show that there was no summons, and if he does so, the conviction is bad. *Ibid.*
4. Whether a conviction, drawn up in a form given by statute, not reciting the summons, is *prima facie* evidence of the summons, *quære.* *Ibid.*

COPY.

See EVIDENCE, 22, 30, 31.

COPYHOLD.

See COURT ROLL.

If a copyholder make a lease which is not according to the custom of the manor, the lessee may nevertheless maintain ejectment thereon. *Doe d. Robinson v. Boufield.* 558

COPY OF COURT ROLL.

See COURT ROLL.

CORONER.

It is the duty of a coroner before whom an inquisition *super visum corporis* is taken, to read over to every witness examined on such inquest the evidence he has given, and to desire the witness to sign it. *Reg. v. Plummer.* 600

COSTS.

See MALICIOUSLY OMITTING TO GIVE NOTICE THAT A JUDGMENT WAS SATISFIED, 2.—TRESPASS, 2.

COSTS OF DOCUMENTS PROVED.

See CERTIFICATE.

COUNSEL.

See ADDRESSING THE JURY.—REPLY.

COUNTY COURT.

See PERJURY, 1.

COURT OF REQUESTS.

By the stat. 48 Geo. 3, c. cx. (loc. and pers.) a commissioner of the Court of Request at Wednesbury is liable to a penalty of £50 if he acts without having a qualification of £50 a year in real property, or £1500 in personals, or £25 a year real and £1000 personal property, "above all charges and encumbrances whatsoever," the proof of which qualification is, by that statute, to lie on him in any action against him for the penalty:—*Held*, that the words "above all charges and encumbrances whatsoever" do not mean beyond payment of all his debts, but only apply to specific charges on the property in respect of which he claims to be qualified. *Held*, also, that, in such actions, it is sufficient if the defendant shows that he has property to the required amount, and that it is not incumbent on him to give any evidence with a view of showing that the property is not encumbered. *Dumelow v. Lees.* 408

Form of declaration. *Ibid.*

COURT ROLL.

1. An examined copy of the court-roll of a manor, made for the purpose of being given in evidence on a trial, does not require a stamp. *Doe d. Burrows v. Freeman.* 396
2. A copy of court-roll duly stamped purported to be signed by Mr. V., who was proved to be the steward of the manor. The lessor of the plaintiff's attorney who produced it, did not know the handwriting of Mr. V., but he stated that he had shown this copy of court-roll to Mr. V., who stated that it had been delivered out by him, as steward of the manor, to

the lessor of the plaintiff.—*Held*, that this acknowledgment of it by Mr. V. was equivalent to the witness having received it from Mr. V., as steward of the manor.
See *d. Burrows v. Freeman*. 356

COVENANT.

See APPRENTICE.

CRUELTY TO ANIMALS.

The 4th and 19th sections of the stat. 5 & 6 Will. 4, c. 59, (for preventing cruelty to animals,) which require every person who shall impound or confine any cattle or animal in any enclosed place, to supply it with food; and empower such person to sell the animal for the value of the food, and direct notice of action to be given to him, and the venue to be laid in the proper county, &c., do not apply to all cattle taken under all circumstances, but only to cattle or animals impounded or confined in cases where the distrainer had a right to distrain, or at least some colour for it. *Machell v. Ellis*. 682

CURTILAGE (BREAKING INTO BUILDING WITHIN.)

On the trial of an indictment for breaking into a building within the curtilage, under the stat. 7 & 8 Geo. 4, c. 29, s. 14, it appeared that the building was in the fold-yard of the prosecutor's farm, and that, to get from his dwelling-house to the fold-yard, it was necessary to pass through a yard called the pump-yard, into which the back-door of the dwelling-house opened, the pump-yard being separated from the fold-yard by a wall four feet high, in which there was a gate. The fold-yard having another gate leading to fields on one side, a hedge with a gate leading to the high road on another, the other sides of the fold-yard being bounded by the farm buildings, and a continuous wall from the dwelling-house:—*Held*, that the building was within the curtilage. *Reg. v. Gilbert*. 84

CUSTOM.

See EDITOR.

CUSTOM OF TRADE.

See CHARTERPARTY, 2. TROVER, 5.

1. Where goods are sold by sample, evidence of a custom of trade as to returning or making an allowance for such of the goods as do not answer the sample, is receivable. *Cooke v. Riddell*. 561
2. But in such a case the vendee cannot claim the benefit of the custom, if he have not elected to comply with it within a reasonable time. *Ibid*.

DAMAGES.

See FALSE IMPRISONMENT, 1, 3.

DECLARATION (FALSE.)

See FALSE DECLARATION.

DECLARATION IN ARTICULO MORTIS.

See DYING DECLARATION.

DEED (LOST.)

See EVIDENCE, 30.

DEFACING A PARISH REGISTER

See PARISH REGISTER.

DEMURRER.

1. Whether in a case of felony, not capital, a judgment against a prisoner on a demurrer to the indictment is conclusive against him as in misdemeanour, and whether the prisoner, being tried for the felony, after a judgment against him on demurrer, is confined to capital cases. *Reg. v. Bowen*. 501
2. A judgment for a prisoner on demurrer in a case of felony, on the ground that the indictment does not sufficiently charge the felony, is no bar to a subsequent good indictment for the same felony. *Reg. v. Richmond*. 240

DEPOSITIONS.

See CORONER. EVIDENCE, 10.

DESTROYING A PARISH REGISTER.

See PARISH REGISTER.

DISCHARGED PRISONER'S PASS.

See FORGERY, 3, 4.

DISHONOUR (NOTICE OF.)

See BILL OF EXCHANGE, 2, 6.

DISTRESS.

See EXECUTORS AND ADMINISTRATORS, 1. RIGHT TO BEGIN, 4.

Where a farm was let under an agreement, and the agreement imposed a penalty on the tenant for selling hay produced on the premises, and gave the lessor power to recover the same "by distress, as for rent in arrear:"—*Held*, that the lessor might so distrain, although the agreement was not under seal. *Pollitt v. Forrest*. 560

DISTRESS DAMAGE FEASANT.

See CRUELTY TO ANIMALS.

DOCUMENTS (COSTS OF PROVING.)

See CERTIFICATE.

DROWNING A MINE.

See MINE.

DWELLING-HOUSE.

See ARSON, 3. LARCENY IN A DWELLING-HOUSE.

DYING DECLARATION.

A person who was a Roman Catholic was shot on the 29th of July, between twelve and one, A. M., and died at half-past nine, P. M., on the 30th. Almost immediately after being wounded, he said, "I am shot; I am dying;" and after that he continued in a desponding state, and said, "I will never get over this;" and between seven and eight hours before his death he took leave of a child, saying, "I shall never see you more." About three hours before his death it was proposed to him that a priest should be fetched, to which he replied, "That's not of much use;" and on his then being asked to see a ma-

gistrate, he replied, "Not yet." Upon this he made a statement. It was proved by a Roman Catholic priest, that if a Roman Catholic wishes to make his peace with God, he usually sends for a priest to receive extreme unction, having previously made confession, and received the communion; but that extreme unction is not deemed by the Roman Catholic Church essential to salvation:—*Held*, that the statement was receivable in evidence as a declaration in articulo mortis. *Reg. v. Howell.* 689

EDITOR.

See AMENDMENT, 1.

1. In an action for wrongfully dismissing the editor of a newspaper, the declaration stated that he was engaged for a year. There was no direct evidence as to the time for which the plaintiff was engaged:—*Held*, that the plaintiff might go into evidence to show a custom for editors of newspapers to be engaged for a year, unless there was an express stipulation to the contrary. *Holcroft v. Barber.* 4
- 2 *Semble*, that the custom is, that the engagements of editors, sub-editors, and reporters of newspapers, are for a year, unless there be an express stipulation to the contrary, and that this custom is binding on both parties. *Ibid.*
3. *Semble*, that the usage is, that the engagements of editors, sub-editors, reporters, and other persons who are regularly employed on newspapers are for a year, unless there be an express agreement to the contrary. *Baxter v. Nurse.* 10

EJECTMENT.

See RIGHT TO BEGIN, 2. COPYHOLD.

In ejectment on the demise of "G. M. and Sarah his wife, Joyce Child, Armand Shalton and Eleanor his wife, S. B. and Ann his wife," the female lessors of the plaintiff made out their title as co-heiresses of Jonah Child. It appeared that the husband of Eleanor was an Egyptian, but no evidence could be given that his first name was Armand. The judge, at the trial, allowed the record to be amended by striking out the name of Armand, and *Held*, that the fact that Shalton was an alien, would not prevent the lessors of the plaintiff from recovering in the present ejectment. *Doe d. Miller v. Rogers.* 390

EMBEZZLEMENT.

See LARCENY, 11.

1. If a person, whose duty it is to receive money for his employer, receive money and render a true account of all the money he has received, he is not guilty of embezzlement, if he absconds and does not pay over the money; but if he had received the money, and had rendered an account in which it was omitted, this would be evidence to show that he had embezzled the amount. *Reg. v. Creed.* 63
- 2 The collector of a water company, as was his practice, gave the prisoner, who was

the turncock, three receipts for water rents, desiring him to receive the amounts. On a subsequent day, the collector asked the prisoner if he had received the amounts, when he said that he had, and would pay them over on the following Monday; instead of which, he absconded:—*Held*, no embezzlement. *Reg. v. Creed.* 63

3. It was the duty of a clerk to receive money for his employer, and pay wages out of it, and to make entries of all moneys received and paid in a book, and to enter the weekly totals of receipts and payments in another book, upon which last book he, from time to time, paid over his balances to his employer. The clerk having entries of weekly payments in his first book, amounting to £25, he entered them in the second book as £35; and, two months after, in accounting with his employer by these means, made his balance £10 too little, and paid it over accordingly:—*Held*, that the clerk could not, on these facts, be convicted of embezzlement without its being shown that he had received some particular sum on account of his employer, and had converted either the whole or part of that sum to his own use. *Reg. v. Chapman.* 119
4. It was the duty of a servant, authorized to receive money for his employer, to account to his employer on the evening of every day for the money received during the day by him for his employer, and to pay over the amount. He received three sums for his employer on three different days, and neither accounted for those sums, nor paid them over. He never denied the receipt of them, or rendered any written account in which they were omitted:—*Held*, that, if the servant wilfully omitted to account for these sums, and pay them over on the respective days on which he received them, these were embezzlements, and that such wilful omissions to account and pay over were equivalent to a denial of the receipt of them. *Reg. v. Jackson.* 384

ENTERING CAUSES FOR TRIAL.

See TRIAL, 3, 4.

ESTATE

See TENANT IN COMMON.

EVIDENCE

See AGENT, 3. ATTORNEY. BIGAMY, 1, 4. CONFESSION. CORONER. COURT ROLL, 1, 2. DYING DECLARATION. EXECUTORS AND ADMINISTRATORS, 4. FOREIGN LAWS (PROOF OF.) LARCENY, 7, 8. LIBEL, 2. MAP. OPENING OF COUNSEL. PERJURY, 6. RAPE, 2. TRESPASS, 3, 4. TROVER, 8.

1. A defendant had written a letter to Mr. H., the plaintiff's attorney, who stated in evidence that he had written a letter in answer to it, which he gave to the defendant at his (Mr. H.'s) office on the 4th of April. This letter of the 4th of April being called for under a notice to produce, the defendant's counsel stated that there was no such letter, and proposed to show by evi-

- dence that Mr. H. had not given his letter to the defendant on the 4th of April, at his office, as stated, because the defendant was at another place, and also because Mr. H.'s letter was dated on the 6th of April, and was sent by post on that day. The judge received the evidence thus proposed to be given for the defendant before allowing the plaintiff to go into secondary evidence of Mr. H.'s letter of the 4th of April; but *held*, that such evidence was not evidence to the jury, but to himself only, and that any part of it which was written evidence should not be read by the officer of the court, but should be handed to the judge, and then shown to the opposite counsel. *Smith v. Sleep*. 48
2. If a witness, who is called to disprove the signature of the defendant to an acceptance, states that he believes the signature is not that of the defendant, and gives, as his reason for that belief, the absence or presence of certain peculiarities which he says do or do not exist in the genuine signatures of the defendant, the opposite counsel may put into his hand a paper unconnected with the cause, and ask if, in his opinion, that contains a genuine signature of the defendant; and, if he answer in the affirmative, he may then be asked, "Does the signature in this paper, which you say is genuine, contain the same peculiarities, or want the same peculiarities, (as the case may be,) which you have before stated as your reasons that the signature in dispute is not genuine?" And, *semble*, that, if the witness says it does not, it would be competent to lay that paper before the jury that they might judge of that answer. *Younge v. Honner*. 51
3. To give evidence of the transcript of the rules of a benefit society enrolled at the office of the clerk of the peace, by proof of an examined copy of it, the witness who examined the copy with the transcript must prove that he examined the copy of *all* the rules with the transcript. *Reg. v. Boynes*. 65
4. In an action against an attorney for negligence respecting a reference of an action for breach of promise of marriage, brought by Miss S. against the present plaintiff, in which he was attorney for the present plaintiff, it appeared that there were two parts of the agreement to refer, one signed by Miss S.'s attorney, (unstamped,) which was in the possession of the present defendant, the other signed by the present defendant as attorney for the present plaintiff, and in the hands of Miss S.'s attorney. The latter had been stamped within twenty-one days after its execution, and the expense of the stamping, and part of the expense of the making of it, had been paid by the present plaintiff, the rest being taxed off. The part in the hands of the present defendant being called for and produced under a notice to produce, being unstamped, could not be read in evidence:—But, *held*, that the present plaintiff was entitled to have the stamped part of the agreement produced by Miss S.'s attorney, although Miss S. had desired her attorney not to produce it. *Held*, also, that Miss S.'s attorney was not bound to produce letters written to him by the present defendant, as attorney for the present plaintiff, he stating that he was desired by his client, Miss S., not to produce them; but that, if letters written by Miss S.'s attorney to the present defendant, as attorney for the present plaintiff, were not produced when called for under a notice to produce, Miss S.'s attorney was bound to give secondary evidence of their contents, although desired by Miss S. not to do so. *Higgs v. Taylor*. 85
5. A. brought trover for goods which had been seized at the house of B. by the defendant, as sheriff of S., under a *fi. fa.* against B. A. claimed under a sale at auction, which was stated at the time of the sale to have been made under an assignment by B. for the benefit of his creditors. To show that the sale was fraudulent, the defendant's counsel proposed to give evidence, that, when the execution went in, and while the goods remained in B.'s possession, B. said that the goods were his son's:—*Held*, that this evidence was not receivable. *Roberts v. Justice*. 93
6. On the trial of an issue directed to try whether goods seized by the sheriff of H. under a *fi. fa.* against G. were the goods of the plaintiff, the plaintiff's counsel proposed to give evidence of a statement made by G., before the execution went in, that he (G.) was indebted to the plaintiff, and was going to assign his goods to him, by way of payment:—*Held*, that this evidence was not received. *Prosser v. Gwilliam*. 95
7. On the trial of an issue directed to try whether goods seized under a *fi. fa.* sued out against A., at the suit of the defendant, were the goods of the plaintiff, the declarations of A., as to the property of the goods, are not receivable in evidence on the part of the plaintiff. *Stoher v. James*. 121
8. Assumpsit by a servant against his master, for not employing him under a written agreement to serve for a year, which had not expired. The agreement was produced under notice:—*Held*, that it was not necessary to call the subscribing witness to prove the execution. *Bell v. Chaytor*. 162
9. *Semble*, that on the trial of a cause a party ought not to be allowed to go into evidence to show why he could not procure the attendance of a particular person as a witness, or to show what steps he has taken to procure such person's attendance at the trial. *Turpin v. Heald*. 264
10. In an action by B. against A. for false imprisonment, A. pleaded a justification, that B. had been guilty of embezzlement. A. and his witnesses having made the charge before a magistrate, depositions

- were taken in the hearing of B., and he made a statement in answer:—*Held*, that, on the trial of the action for false imprisonment, these depositions, and the plaintiff's statement in answer, were receivable in evidence for the defendant, as being matters stated in the hearing of the plaintiff, to which he made an answer, but that the depositions were no proof of any fact therein stated. *Jones v. Morrell*. 266
11. In trespass for taking the plaintiff's goods, with a plea of not possessed, it was proposed to show that the goods were not his, by showing, *inter alia*, that he was not twenty-one. To show this, it was proved, that, by the custom of the law of the Jews, children are circumcised on the eighth day from their birth, and that it was the duty of the chief rabbi to perform this rite, and make an entry of it in a book. It was proposed to give in evidence the entry in this book of the plaintiff's circumcision, the entry being in the handwriting of a chief rabbi, who was dead:—*Held*, that the entry was not receivable in evidence. *Davis v. Lloyd*. 275
12. In case for running down the plaintiff's ship, a nautical witness may be asked, whether, having heard the evidence, and admitting the facts proved by the plaintiff to be true, he is of opinion that the collision could have been avoided by proper care on the part of the defendant's servants. *Fenwick v. Bell*. 312
13. A witness, who states that he had at one time received a number of letters from one of the parties in a cause, containing statements with reference to a particular fact,—but which letters he had since destroyed,—cannot be examined as to the general contents of such letters, for the purpose of ascertaining the impression thereby produced in his mind with reference to the fact in question. *Topham v. McGregor*. 320
14. The editor of a newspaper swore that A. was the writer of a certain article which had appeared in that paper many years before, and the MS. had been lost. A. stated that he had been in the habit of writing such articles for the newspaper in question, but that he had no recollection of having sent the particular article now referred to. He swore, however, that all the statements made in the articles he did send were true:—*Held*, that the newspaper might be put into A.'s hand, in order to refresh his memory; and that he might be asked, whether, looking at the article, he had any doubt that the fact was as therein stated. *Ibid*.
5. In an action by a sheriff for his poundage, proof that he has acted as sheriff is sufficient evidence of his being so without proof of his appointment. *Bunbury v. Matthews*. 380
16. In an action for sheriff's poundage, the sheriff's officer produced the sheriff's warrant under which he had acted, which concluded, "given under the seal at my office." The only seal to it was a small piece of blue paper wafered to it and stamped with a wafer stamp. The officer stated that he did not know this to be the seal of the sheriff or his office, but stated that he had received the warrant from Mr. B., who acted as the plaintiff's undersheriff, and that it was precisely similar to all the other warrants on which he had acted:—*Held*, sufficient proof of the seal. *Bunbury v. Matthews*. 380
17. On an indictment against accessories before the fact to the forgery of an administration bond on administration granted of the effects of J. S.:—*Held*, 1st, that a session-clerk from Scotland had no right to look at a kirk session book to learn the writing of a clergyman to enable him to swear to the writing of a certificate found, on the death of J. S., among his papers. 2dly, That such book was not evidence itself, and, not being so, could not be looked at for any purpose whatever. 3dly, That the certificate in question, which was a certificate purporting to have been given by the minister and elders to J. S. on leaving the kirk, would not be evidence, even if the minister's writing were proved. 4thly, That the proof that the certificate was found among papers endorsed on the outside in J. S.'s handwriting, which papers were delivered, after his death, by a servant to J. S.'s master, who produced them at the trial, was no proof that the certificate had been in J. S.'s possession, the servant not being called as a witness; that the endorsement only showed that that one paper had been in Stewart's presence, and the statement in his writing was not evidence. *Reg. v. Barber*. 434
18. In cross-examining the master of J. S., the prisoner's counsel asked whether he did not put the age (sixty-five) on the tombstone from the best information he could get; and he said he put it there in consequence of what J. S. told him. *Ibid*.
19. The counsel for the prosecution asked what it was that J. S. told him:—*Held*, that this question could not be put. *Ibid*.
20. An indictment for perjury in an affidavit stated the affidavit to have been sworn "before one R. G. W., then and there being a commissioner duly authorized and empowered to take affidavits in the said county of Gloucester in or concerning any cause depending in her said Majesty's Court of Exchequer at Westminster." It was proved by Mr. R. G. W. that he had acted as a commissioner for taking affidavits in the Exchequer for ten years, but had never seen his commission, and that ten years ago he applied to his agent to procure for him a commission to take affidavits in the Exchequer, and that his agent had told him that he had done so:—*Held*, that the proof of Mr. R. G. W.'s acting as a commissioner was *prima facie* evidence that he was so. *Reg. v. Newton*. 466
21. T. occupied lands from 1790 to 1815, but had ceased to occupy them before

- the time of his death. At T.'s death, among his papers were found a series of receipts for the rent of this land from 1790 to 1804, signed by M. P. sen., who died in 1806, and a similar series of receipts for rent from 1806, to 1815, signed by M. P. jun., (the daughter of M. P. sen.,) who died in 1826:—*Held*, in ejectment for these lands, that these receipts were receivable as evidence of the seisin of M. P. sen., and M. P. jun. *Doe d. Blayne v. Savage.* 487
22. An examined copy of an entry in a parish register of marriages is receivable in evidence to prove a marriage, although the entry in the register purport to be attested by one witness only, the words "In the presence of" in the entry being followed by one name only. *Ibid.*
23. In an action for use and occupation by the assignees of a bankrupt, it was proved that the defendant had said that he had been served with a writ for rent by the attorney for the assignees, but that the bankrupt was his landlord, and his attorney had sent an indemnification for the bankrupt to sign, which the bankrupt had signed:—*Held*, that the assignees were entitled to give in evidence statements made by the bankrupt, without any further proof of the nature or extent of the indemnity. *Arkle v. Wakeman.* 516
24. A., by an agreement in writing, agreed to win stones, &c., "for the purpose of building" certain cottages:—*Held*, that parol evidence could not be given, to explain the sense in which the word "building" was used. *Charlton v. Gibson.* 541
25. In order to show that the defendant, in an action for goods sold and delivered, was not liable, it was proposed to ask a witness, whether the plaintiff's wife had said anything to him as to the person whom her husband had trusted for the goods:—*Held*, that the question could not be put. *Duckworth v. Johnson.* 584
26. In an action for goods sold and delivered upon the credit of the defendant, a question as to the amount of the defendant's income cannot be put, if the evidence be tendered with a view to show the improbability of authority having been given to purchase the goods. *Rowe v. Polkinghorne.* 618
27. Where, however, an action was brought against a widow for dresses ordered and worn by her daughter, who was about to be married:—*Held*, that evidence of the amount of the defendant's income was admissible, as tending to show that the dresses were not supplied upon her credit, but upon the credit of her daughter's future husband. *Ibid.*
28. It was proposed on the part of a plaintiff to give in evidence a letter written by the defendant's attorney, which purported to be an answer to a letter written to him by the plaintiff's attorneys:—*Held*, that, if the plaintiff's counsel put in this letter of the defendant's attorney, he should also call for and put in the letter to which it was an answer, and not leave it to the defendant to put in the letter of the plaintiff's attorneys as his evidence. *Walton v. Moore.* 626
29. On the trial of an issue directed by the Court of Chancery to try whether a deed of assignment was fraudulent or not, a witness was called to prove that another deed, which bore date more than three years before the trial, was not executed on the day on which it bore date, but was executed by one party on the day after, and by the other three days after. The witness stated, that he could not recollect how this was, but stated that he had been examined on this subject before commissioners of bankrupt within a fortnight of the time when the matters occurred, and when the facts were fresh in his memory. He stated that his examination before the commissioners was not in his own handwriting, but he had signed it. The witness was allowed to look at his examination, to refresh his memory. *Wood v. Cooper.* 645
30. In covenant on a lost deed with non est factum pleaded, it was proved that, on search, the deed, which by the date was sixty years old, could not be found in the muniment-room of the plaintiff, but that there was found there a paper which purported to be an attested copy of it. It was proved that both the persons whose signatures were to it as attesting the copy were dead; and the handwriting of one of them was proved; and it was also proved that persons of the same names as those who had attested the original deed were also dead:—*Held*, that upon this proof, this paper was not receivable as secondary evidence of the deed. *Brindley v. Woodhouse.* 647
31. In an action against a sheriff for a false return to a *fi. fa.*, office copies of the *fi. fa.* and return which are not proved to have been examined copies, are not receivable in evidence, even where the original cause was in the same court as the action against the sheriff. *Picher v. King.* 655
32. On the trial of an indictment for a conspiracy, the answers in Chancery of the defendants, made on oath by them in a suit instituted against them by the prosecutor, are receivable in evidence on the part of the prosecution. *Reg. v. Goldshede.* 657
33. An information was filed by the Attorney-General, under the stat. 33 Geo. 3, c. 52, s. 62, against an officer of the East India Company, for receiving gifts in India. A mandamus was granted under the stat. 13 Geo. 3, c. 63, s. 40, for the examination of witnesses in the Supreme Court at Madras. One of the witnesses there gave in evidence certain original accounts, copies of which were returned to the Court of Queen's Bench by the Supreme Court at Madras, with the examinations:—*Held*, that on the trial of the information in the Court of Queen's Bench, these

copies were not receivable in evidence, and that the Court at Madras should have transmitted the original accounts to the Court of Queen's Bench. *Reg. v. Douglas*. 670

EXCISE OFFICERS.

See **TRESPASS**, 5, 6.

EXECUTION.

See **BILL OF EXCEPTIONS**.

EXECUTOR DE SON TORT.

1. A. had ordered a pair of boots of B., and had paid B. for them. The boots had never been delivered to A., and being in the hands of the journeyman who made them, A. was obliged to pay the journeyman the price of making them before he could get possession of them. A. being sued as executor de son tort of B.:—*Held*, that he was liable for the value of the boots as executor de son tort, but that he was entitled to be allowed the sum to be paid the journeyman. *Hobby v. Ruell*. 716
2. A., after the death of B., obtained possession of the cattle of B. from C. with whom at the death of B. they were agisted; A. paying C. for the agisting, A. being sued as executor de son tort of B.:—*Held*, that he was not entitled to be allowed for the sum to be paid to C. for the agisting of the cattle. *Ibid*.

EXECUTORS AND ADMINISTRATORS

See **EXECUTOR DE SON TORT**. **FORGERY**, 5.

LANDLORD AND TENANT, 1.

1. A. had his goods distrained on for rent (no rent being due) and was obliged to pay a sum of 9*l*. 13*s*. to procure the distress to be withdrawn. A. died, and his executrix brought trespass for the taking of the goods, and the declaration stated that the goods were detained till A. paid 9*l*. 13*s*. whereby his personal estate was diminished:—*Held*, that on this declaration the executrix could only recover damages to the amount of 9*l*. 13*s*.; and *semble*, that the executrix could not have recovered any greater amount if the declaration had been in any other form. *Lockier v. Paterson*. 271
2. On a plea of *plene administravit*, it was proved, on the part of the plaintiffs, that, at the time of the death of the intestate, there were crops on his farm, but that there had been an auction on the premises about a month before, at which these crops were put up for sale:—*Held*, that, as the crops remained on the premises at the time of the death of the intestate, it lay on the defendant, as administrator, to show that these crops had not come to his hands. *Stroud v. Dandridge*. 445
3. On a plea of *plene administravit*, it appeared that the intestate, six months before his death, had assigned all his effects to trustees for the benefit of such of his creditors as should execute the deed of assignment. The deed was executed by himself and the trustees, but not by any other creditor:—*Held*, that the adminis-

trator might give in evidence advertisements published soon after the execution of the deed, stating where the deed lay for execution by the creditors, and calling a meeting of creditors as to the sale of the effects, and also a resolution of that meeting, that the effects should be sold, as this evidence went to show that the deed was acted upon, and was a *bona fide* and not a fraudulent deed. *Stroud v. Dandridge*. 445

4. In an action on a promissory note, payable "to the executors of the late Mr. W. B." the proper proof that the plaintiffs are the executors of Mr. W. B. is the production of the probate of his will, and the reading in evidence so much of it as shows that he appointed the plaintiffs his executors, and the giving in evidence the grant of administration (annexed to the probate) is not sufficient for this purpose. *Hamilton v. Aston*. 679

FALSE DECLARATION, UNDER THE STAT. 5 & 6 WILL. 4, c. 62.

1. An indictment on the stat. 5 & 6 Will. 4, c. 62, s. 13, for making a false declaration before a magistrate, stated, that, by the rules of a benefit society, any full free member of it who sustained a loss by an accidental fire was to be indemnified to the extent of £15, on making a declaration before a magistrate verifying his loss, and that the defendant was a full free member of the society, and had made a false declaration before a magistrate, that he had sustained a loss by fire. On the trial, the rules of the society could not be proved. But *held*, that the allegations in the indictment respecting the rules might be rejected as surplussage, as the offence of the defendant, in making the false declaration as to the fire, would be an offence within the statute, if no such benefit society had ever existed. *Reg. v. Boynes*. 65
2. The 18th section of the stat. 5 & 6 Will. 4, c. 62, which enables magistrates to receive voluntary declarations instead of oaths, extends to declarations generally, and is not confined to declarations with respect to the confirmation of written instruments, or allegations, or proofs of debts or of the execution of deeds, or other matters ejusdem generis. *Ibid*.
3. Where a person is indicted for having made a declaration as to a fire having taken place at his house, evidence may be given, that, with the declaration, he sent a certificate, which stated the fire to have occurred, and that the signatures to that certificate are all forgeries, as this evidence may go to show that the declaration was wilfully false. *Ibid*.

FALSE IMPRISONMENT.

See **EVIDENCE**, 10.

1. If a magistrate commits a person to prison in a case in which he has no jurisdiction, he is liable for all the circumstances that usually attend the execution of a warrant of commitment, such as the party

being handcuffed, having his hair cut short at the prison, and his being put in a bath there; but not for any violence or excess of the officers. *Mason v. Barker.* 100

2. If a party is taken into custody by a constable, on a warrant, the signature of which is proved to be of the handwriting of the defendant, a magistrate, this is *prima facie* evidence against the defendant in an action for false imprisonment, without further proof that the warrant was issued by him. *Ibid.*
3. Where a party is committed for non-payment of a penalty, in a case where the magistrate has no jurisdiction, and, after a part of the imprisonment, he is discharged on the penalty being paid, the jury may, in an action for false imprisonment against the magistrate, include the amount of the penalty in the damages, if they are satisfied that the plaintiff paid it, or that it was paid in such a way that the plaintiff was liable to repay the amount to the person who actually advanced the money. *Ibid.*

FALSE PRETENCES.

1. An indictment for obtaining money by false pretences charged that the defendant unlawfully did falsely pretend to C. S., that a certain paper writing which he produced to C. S. was a good five pounds Ledbury-Bank note; by means whereof he unlawfully obtained money from C. S., with intent to cheat and defraud him of the same; whereas, in truth and in fact, the paper writing was not a good five pounds note of the Ledbury Bank:—*Held*, that the indictment was bad, as it did not charge that the defendant *knew* that it was not a good five pounds note of the Ledbury Bank, and that this was not aided by the allegation of the intent to defraud. *Reg. v. Philpotts.* 112
2. A was indicted for obtaining £200, by falsely pretending that he had obtained from Lord S. the appointment of emigration agent at P., which was worth £600 a year; and that for £200 he would give the prosecutor one-third of the agentship. The prosecutor proved that he gave the money on this pretence, which was false; but that, before he parted with his money, the defendant prevailed on him to execute a deed of co-partnership with him, in which the consideration was stated to be £200. and in which nothing was said of the agentship, or how it was obtained:—*Held*, that the putting in of this deed on the part of the prosecution did not exclude the parol evidence of the false pretences; and that, if the deed was a part of the defendant's scheme to effect the fraud, the defendant should be found guilty. *Reg. v. Adamson.* 192
3. The money of a benefit society whose rules were not enrolled was kept in a box, of which E., one of the stewards, and two others had keys; the defendant on the false pretence that his wife was dead, which pretence he made to the clerk of the

society in the hearing of E., obtained from the hands of E. out of the box £5:—*Held*, that in an indictment the pretence might be laid as made to E. and the money, the property of "E. and others," obtained from E. *Reg. v. Dent.* 249

4. An indictment stated, that, by the rules of a benefit society, every free member was entitled to £5 on the death of his wife, and that the defendant falsely pretended that a paper, which he produced, was genuine, and contained a true account of his wife's death and burial, and that he further falsely pretended that he was entitled to £5 from the society, by virtue of their rules, in consequence of the death of his wife. By means of which "*last-mentioned false pretence*" he obtained money:—*Held*, good. *Ibid.*
5. Form of indictment. 250 (a)

FISHERY.

1. Where a private river runs through a manor, the presumption of law is that each owner of land within the manor and on the bank of the river has the right of fishing in front of his land; and if the lord claims a several fishery, he must make out that claim by evidence. *Lamb v. Newbiggin.* 549
2. From the words of a deed under which the lord claimed, it was attempted to raise a presumption that the right of several fishery within the manor passed to him by that deed as appurtenant to the manor:—*Held*, that this presumption was rebutted by proof, that, before the date of that deed, owners of land within the manor and on the bank of the river had the right of free-fishery therein. *Ibid.*

FOREIGN LAWS (PROOF OF.)

1. A witness to prove foreign law must be a person peritus virtute officii, or virtute professionis. *The Sussex Peerage.* 213
2. A Roman Catholic Bishop, holding in this country the office of a coadjutor to a vicar apostolic, and as such authorized to decide on cases affected by the law of Rome, was therefore *held*, in virtue of his office, to be a witness admissible to prove the law of Rome as to marriage. *Ibid.*
3. A professional or official witness, giving evidence as to foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinion, but the law itself must be taken from his evidence. *Ibid.*

FORGERY.

See EVIDENCE, 17, 18, 19.

1. A benefit club, called the Urgant Lodge, of Odd Fellows, whose funds were raised by contributions of the members, had deposited two sums with the Brecon Bank, who had given the usual bankers' receipt; but the bankers were directed not to pay the money, except to the order of the committee of the club. The prisoners, who were members of the club, got possession of the receipts, and, with them,

- presented to Mr. E., one of the bankers, a forged paper purporting to be an authority to the bearers to receive the money, signed by three officers of the club, called noble-grand, vice-grand, and secretary, and sealed with the lodge seal; and Mr. E., who paid the prisoners the money, proved that he would not have done so on the production of the receipts only, without this paper. The prisoners were convicted on an indictment for forging and uttering this paper, which in some of the counts was described as a *warrant*, and in others as an *order* for the payment of money; and the fifteen judges held the conviction right. *Reg. v. Harris.* 751
2. A post-dated cheque is an order for the payment of money within the meaning of the statute 11 Geo. 4 & 1 Will. 4, c. 66, relating to the forging and uttering of orders "for the payment of money," &c. *Reg. v. Taylor.* 213
3. A person who knowingly utters a forged pass of a discharged prisoner, purporting to have been given under the stat. 5 Geo. 4, c. 85, may be convicted of uttering a "forged warrant and order for the payment of money," although the forged pass be not precisely in the form given by that statute, and although it does not purport to be sealed with the county seal, or any seal provided for the purpose, the only seals to it being two small pieces of paper affixed to it by wafers. *Reg. v. McConnell.* 371
4. A woman who applies to a relieving officer for money on such a forged pass, and produces it to him, may be convicted of uttering a forged warrant and order for the payment of money, although the forged pass direct the money mentioned in it to be paid to "William Henry," on his giving a receipt. *Ibid.*
5. On the trial of an indictment for forging an administration bond, it was objected, that the stat. 22 & 23 Car. 2, c. 10, requiring the bond to be given by the party to whom administration was granted, and not by the party that was entitled to administration, no forgery was made out; but the bond was a good bond within the statute, having been given by the party to whom, in fact, administration was granted:—*Held*, that this was not a good objection. *Reg. v. Barber.* 434
6. A forged paper was in the following form:—"To M. & Co. Pay to my order two months after date, to Mr. J. S. the sum of £80, and deduct the same out of my account." It was not signed, but across it was written, "Accepted, Luke Lade;" and at the back the name and address of J. S. M. & Co. were bankers, and Luke Lade kept cash with them:—*Held*, that this paper was a warrant for the payment of money, as, if genuine, it would have been a warrant from Luke Lade to the bankers to pay the money to J. S. *Reg. v. Smith.* 700
7. If A exhibit a forged receipt to B., a person with whom he is claiming credit

- for it—this is an uttering within the stat. 1 Will. 4, c. 66, s. 10, although A. refuse to part with the possession of the paper out of his hand. *Reg. v. Radford.* 707
8. On the trial of an indictment for forgery with intent to defraud "H. D., one of the public officers of the Y. district bank," H. D. was called, and stated himself to be so, and an examined copy of the return forwarded to the Stamp Office, under the stat. 7 Geo. 4, c. 46, in which he was stated to be so, was put in. This copy had neither the affidavit at the close of the return, which is directed by schedule A. of that statute, nor the signature, and the date was left blank, but it was not objected that the return did not relate to the period of the uttering:—*Held* by the fifteen judges to be sufficient proof that H. D. was the public officer. *Reg. v. Carter.* 741
9. Whether, in a case of forgery with intent to defraud a company acting under the stat. 7 Geo. 4, c. 46, it is allowable to lay the intent to be to defraud one of the shareholders and others, or whether the intent must be laid to defraud one of the public officers, *quære.* *Ibid.*
10. A paper in the following form:—"Mr. Johnson—Sir,—Please to pay to James Jackson the sum of £13, by order of Christopher Sadler, Thornton le Moor, brewer, the district bank I shall see you on Monday, your obliged Chr. Sadler," is an order for the payment of money. *Ibid.*
11. A. uttered a forged paper in the following form:—"Mr. M. will be pleased to send by the bearer £10 on Mr. H.'s account, as Mr. H. is very bad in bed, and cannot come himself." The paper purporting to be signed "M. R., foreman, St. A. Foundry." Mr. M. was clerk to Messrs. C., bankers, with whom Mr. H. kept an account, and R. was foreman to Mr. H., but had no authority to draw on Mr. H.'s bankers:—*Held*, that this was a warrant for the payment of money. *Held*, also, that any instrument for payment under which, if genuine, the payer may recover the amount against the party signing it, may be properly considered a warrant for the payment of money, and that it is equally this, whatever be the state of the account between the parties, and whether the party signing it has at the time funds in the hands of the party to whom it is addressed or not. *Held*, also, that, as by this instrument, if genuine, R. says in effect that he has the authority of Mr. H., who had an account with the bankers, it is as much a warrant as if he himself had had such an account, and would equally have bound him. *Reg. v. Fivian.* 719

FRAUD.

See CONTRACT, 3.

GAME.

See POACHING.

GAME CERTIFICATE.

See CONVICTION, 1.

GOODS SOLD.*See* EVIDENCE, 26, 27.**GOVERNMENT PROSECUTION.***See* REPLY.**GRAND JURY.***See* PERJURY, 6, 7.**GUEST.***See* INNKEEPER.**HIGHWAY.**

- 1 An indictment for non-repair of a highway stated, that there was a Queen's highway for carriages, &c. "leading from the town of A., in the county of B., towards and unto the village of E., in the same county," a part of which was out of repair. The part of the road charged to be out of repair was a portion of a lane called F. lane; and it was proved that, to go from the town of A. to the village of E. with a carriage, a person must go four miles along the C. turnpike road, then all along F. lane, and then cross the W. turnpike road, and for a short distance go along a road which goes from the W. turnpike road to the village of E.:—*Held*, that the road was not misdescribed. *Reg. v. Stevenston.* 55
- 2 To justify a surveyor of highways in taking down a fence, under the stat. 5 & 6 Will. 4, c. 50, s. 69, two things must concur: 1st, the fence must be within fifteen feet of the centre of the road; and 2d, it must be on the road. *Evans v. Oakley.* 125
3. A road was nine feet wide; and there being a piece of unenclosed land at the side of it, also nine feet wide, which land was so rough and uneven, that no carriage ever did or could go over it, the owner of the adjoining field took this land into his field, and put a fence round it. The surveyor of the highways took down the fence:—*Held*, that he was not justified in so doing, under the 69th section of the Highway Act, 5 & 6 Will. 4, c. 50, as the fence was not on the road. *Ibid.*

HOUSE.*See* ARSON, 3. LARCENY IN A DWELLING-HOUSE.**HOUSEBREAKING WITH INTENT TO STEAL.**

An indictment for a misdemeanour, which charges that the prisoner unlawfully broke and entered the dwelling-house of R. P., "with intent the goods and chattels in the said dwelling-house, then and there being, then and there feloniously to steal, take, and carry away," is good, although it does not state whose goods the prisoner intended to steal. *Reg. v. Lawes.* 62

HUSBAND AND WIFE.*See* BILL OF EXCHANGE, 7. EVIDENCE, 25. LARCENY, 2. MANSLAUGHTER, 2.

Where a woman is charged with comforting, harbouring, and assisting a man who

had committed a murder, if the counsel for the prosecution has reason to believe that the woman was married to the man, and it appear clearly that she considered herself as his wife, and lived with him as such for years, he will be justified in not offering any evidence against her, even though he have also reason to believe that the marriage was in some respects irregular and probably invalid. *Reg. v. Good.* 185

IDENTIFYING PRISONERS.

In a case of rape against five, the prosecutrix, when before the grand jury, did not know the names of the different prisoners, but could identify the persons:—*Held*, that the grand jury might call in another witness, who was before the examining magistrate, and there saw the prisoners, and let the prosecutrix describe the different prisoners, and the other witnesses give their names; and that, if the prisoners could not be identified by this mode, they might be brought before the grand jury. *Reg. v. Jenkins.* 536

IMPOUNDING CATTLE.*See* CRUELTY TO ANIMALS.**IMPRISONMENT.***See* FALSE IMPRISONMENT.**INDEMNITY.***See* EVIDENCE, 2, 3.**INDICTMENT.**

See ARSON, 1. BANKRUPT, 1. BIGAMY, 3. CONCERNMENT OF BIRTH CONTRA FORMAM STATUTI. FALSE PRETENCES, 1, 3, 4. HIGHWAY, 1. HOUSEBREAKING WITH INTENT TO STEAL. MINE. NOLLE PROSEQUI. PERJURY, 2. PREVIOUS CONVICTION, 2. SHEEPSTEALING. SHOOTING.

1. An indictment for larceny which charges that the prisoner stole "three eggs of the value of two-pence of the goods and chattels of S. H., is bad, for not stating the species of eggs, because it does not show that the eggs stolen might not be such as are not the subject of larceny. *Reg. v. Cox.* 494

2. An indictment for bestiality, which describes the animal as "a certain animal called a bitch," is sufficiently certain, although the females of foxes and some other animals are called bitches as well as the female of the dog. *Reg. v. Allen.* 495

3. D. C. was indicted for manslaughter, in killing "a certain woman, whose name to the jurors is unknown." D. C. cohabited with the woman, and sometimes said that she was his wife, and sometimes that she was not; and none of the witnesses had heard her called by any name:—*Held*, that, if the jury were satisfied that the deceased was not the wife of the prisoner, and that the name of the deceased could not be ascertained by any reasonable diligence, the description of the deceased was proper; but that, if the

jury should think that the deceased was the wife of the prisoner, the description was bad; for, although there was no evidence of her Christian name, she was entitled to the surname of C., as being that of her husband. *Reg. v. Campbell.* 82

4. An indictment for the murder of an illegitimate child, a month old, in the first count, described the child as Harriet Stroud; and in the second, as "a female of tender age, whose name is to the jurors aforesaid unknown." It was proved that the child was baptized Harriet, and was so called, but there was no evidence that the child had ever been called Harriet Stroud:—*Held*, that the prisoner could not be convicted on either of these counts, as the child clearly had the name of Harriet, though not that of Stroud; and that, in order to sustain the second count, there must be evidence showing that the name of the child could not reasonably have been supposed to be known to the grand jury. *Reg. v. Stroud.* 187
5. The first count in an indictment described the wife of the defendant, and the third count mentioned "the said wife" of the defendant:—*Held*, that this sufficiently referred to the person mentioned as his wife in the first count. *Reg. v. Dent.* 249
6. An indictment for perjury, removed by certiorari, came on to be tried as a Nisi Prius record. As soon as the jury were sworn, the defendant asked to have the indictment read at length to the court and jury. The judge directed it to be done. *Reg. v. Newton.* 469
7. An indictment for the murder of a bastard child, which described the prisoner as a single woman, stated, that, she being big with a male child, did bring forth the said child alive, and that she "afterwards, to wit, on the day and year aforesaid, with force and arms, at &c., in and upon the said male child, feloniously, &c. did make an assault, &c. :—*Held*, that the child was sufficiently described, although the indictment neither stated the name of the child, nor that its name was to the jurors unknown, nor that it had no name. *Reg. v. Willis.* 722

INDICTMENT (FORMS OF.)

1. For destroying, defacing, and injuring a parish register. 501
2. For attempt to murder by placing a child in a bag, and hanging the bag to park palings. 497
3. For making a false declaration, under the stat. 5 & 6 Will. 4, c. 62, s. 13. 67 (a)
4. For false pretences to obtain money from a benefit society. 250 (a)
5. For perjury, in swearing to that which the defendant did not know. 475, n.
6. For perjury committed before a grand jury. 520, n.
7. For perjury on a writ of trial. 732 (a)
8. For concealment of birth. 623
9. Against a bankrupt for not surrendering. 168

INDICTMENT (QUASHING.)

See TRAVERSE, 4.

INJURING A PARISH REGISTER.

See PARISH REGISTER.

INNKEEPER.

1. A person who keeps a public inn is bound to admit all persons who apply peaceably to be admitted as guests. *Hawthorn v. Hammond.* 404
2. A declaration against an innkeeper stated, that the defendant kept an inn, and that the plaintiff, at night, was travelling, and the inn being shut up, the plaintiff knocked at the door of the inn, in order that he should be admitted as a guest, and that, although the defendant heard the knocking, and had notice of the premises, she would not admit the plaintiff into the inn. The defendant pleaded that she did not hear the knocking, and had not notice of the premises:—*Held*, that, on this issue, it was for the jury to say, whether the defendant heard the knocking, and, if so, whether the defendant ought to have concluded from it that the person so knocking at the door was a person requiring to be admitted as a guest. *Ibid.*
3. Form of declaration and pleas. *Ibid.*

INQUISITION.

See CORONER.

An inquisition for manslaughter charged that A. and B. in and upon C. did make an assault, and that A. with a certain stick or staff which he had and held, and B., with a certain stick or cane which he had and held, the said A. feloniously, &c. then and there did strike and beat in and upon the head of him the said A., "thereby then and there giving him" divers mortal wounds, &c. :—*Held* bad, as not sufficiently showing to whom the word "giving" referred; and *semble*, that the charging the blows to be given in the alternative with a stick or staff is also bad. *Reg. v. Jones.* 243

INSANITY.

1. To entitle a prisoner to be acquitted on the ground of insanity, he must, at the time of the committing of the offence, have been so insane that he did not know right from wrong. *Reg. v. Higginson.* 129
2. Opinions of the judges as to the crimes committed by persons afflicted with insane delusions. 131

INSPECTOR OF WEIGHTS AND MEASURES.

See WEIGHTS AND MEASURES.

INSURANCE.

A policy of insurance was effected on goods at and from L. to various places in China, amongst others, to Canton, with leave for the ship named in the policy, or any other ship on board which the interest might be transhipped, to touch at various ports, amongst others, Hong-kong, "or remain at the same until it is deemed expedient to proceed to the port or place of dis-

charge," and the risk was to continue "until the goods are arrived at their final port of destination." When the ship arrived at Macao, hostilities were going on at Canton, so that she could not go thither. In the course of the voyage the goods had received some damage; and the consignees, in consequence, ordered the ship to be taken to Hong-kong, at which place the goods were to be transhipped on board the *J. L.*, in order, as they alleged, to have them examined. Whilst the transshipment was proceeding, the *J. L.* was driven ashore by a storm, and the goods lost:—*Held*, in an action on the policy, that the mere fact of the vessel named in the policy having been unable to proceed to Canton on account of the hostilities did not, under this policy, make Hong-kong the final port of destination, so as to determine the risk; but that it was for the jury to say, whether the consignees, when they transhipped the goods, intended to make it so. *Oliverson v. Brightman*. 360

INTEREST.

As the balance of a banking account remain overdue after the bankruptcy of the banker, his assignees are entitled to recover interest on such balance, as well for the period which has elapsed since the bankruptcy, as for that which had elapsed before it. *Pott v. Bevan*. 335

I. O. U.

See BILL OF EXCHANGE, 1.

JEWS (REGISTER OF THE.)

See EVIDENCE, 11.

JOINT CONTRACTOR.

See PLEADING, 4. WITNESS, 5.

JOINT-STOCK BANK.

See FORGERY, 8, 9.

JUDGMENT.

See VENDOR AND PURCHASER.

Where a party had pleaded guilty at the Central Criminal Court to an indictment for libel, and affidavits were filed both in mitigation and aggravation, the judges refused to hear the speeches of counsel on either side, but formed their judgment of the case by reading the affidavits. *Reg. v. Gregory*. 228

JUROR.

See CHALLENGE OF THE ARRAY.

JUSTICE OF THE PEACE.

See FALSE IMPRISONMENT, 1, 2.

LANDLORD AND TENANT.

See DISTRESS. EXECUTORS AND ADMINISTRATORS, 1. LIVELY OF SEISIN. PLEADING, 1. RAILWAY, 1.

1. The Company of Proprietors of Drury Lane Theatre [made a corporation by the stat. 50 Geo. 3, c. ccciv, loc. and pers.] in 1836, leased the counters of the saloon

of the theatre and the privilege of selling fruit, &c., to Mrs. M. C. for seven years. She died in 1837, and her son, the defendant soon after applied to the committee of the theatre to become tenant on the same terms as the lease, and they accepted him. He occupied down to January, 1843, and paid rent down to the latter part of 1841:—*Held*, in an action for use and occupation, that it was a question for the jury whether the defendant had occupied as assignee of the lease to his mother, or upon a fresh taking upon the same terms as the lease, and, if the latter, he was liable in the present action: and *held*, also, that he would be so liable, although in April, 1843, he and his brother had taken out letters of administration to Mrs. M. C., (therein described as a feme covert at the time of her death,) and also to her husband who had survived her. *Held*, also, that it was no ground for reducing the damages, that, in 1841, the plaintiffs had let the theatre to Mr. M. "subject to the rights" of the defendant, and that Mr. M. had made regulations as to the theatre and its saloon which caused a loss of profit to the defendant, unless those regulations were made by the authority of the plaintiffs, or of persons acting for them and by their authority. *The Theatre Royal Drury Lane Company of Proprietors v. Chapman*. 14

2. If, whilst a tenant from year to year is in possession of lands under an agreement reserving a certain rent, he agrees with his landlord to pay an increased rent, this will not have the effect of creating a new tenancy. *Doe d. Monk v. Geeke*. 307
3. Where premises are demised by indenture at an entire rent, and there is a covenant by the lessee to pay such rent, no action for rent arrear can be brought on such covenant, unless the lessee has been let into full possession of the premises demised. *Holgate v. Kay*. 341
4. Where, in such an action, the defendant, in his plea, sets forth the lease, and then avers that "he entered and was possessed" of the premises there under, this will not estop him from proving, that, when he so entered, he found some part of the said premises in the possession of a third party under an adverse title. *Ibid*.

LARCENY.

INDICTMENT, 1. POST-OFFICE, (OFFENCES RELATING TO THE.) 2. RECEIVER.

1. Overtures were made by a person to the servant of a publican, to induce him to join in robbing his master's till. The servant communicated the matter to the master, and some weeks afterwards, the servant, by the direction of the master, opened a communication with the person who had made the overtures, in consequence of which he came to the master's premises. The master having previously marked some money, it was, by his direction, placed upon the counter by the servant, in order that it might be taken

- up by the party who had come for the purpose. It was so taken up by him:—*Held*, larceny in such party. *Reg. v. Williams.* 195
2. An adulterer cannot be convicted of stealing the goods of the husband brought by the wife alone to his lodgings, and placed by her in the room in which the adultery is afterwards committed, merely upon evidence of their being found there; but it seems it would be otherwise if the goods could be traced in any way to his personal possession. *Reg. v. Rosenberg.* 233
3. If a person drop any chattel, and another find it and take it away with the intention of appropriating it to his own use, and only restore it because a reward is offered, he is guilty of larceny. *Reg. v. Peters.* 245
4. The only cases in which a party finding a chattel of another can be justified in appropriating it to his own use is, where the owner cannot be found, or where it may be fairly said that the owner has abandoned it. *Ibid.*
5. If a person find the chattel of another, and do not immediately bring it to the owner, in the hope that by bringing it on the next day he may receive a present for so doing; whether this is a larceny, *quære.* *Ibid.*
6. A. picked up the purse of B., which contained money, on a turnpike-road along which B. had previously travelled by coach. A. converted the purse and its contents to his own use:—*Held*, no larceny, and that A. was liable civilly, but not criminally. If there had been any mark on the purse by which the owner could have been known, it would have been otherwise. *Reg. v. Mole.* 417
7. A. received goods from B. (who was the servant of C.) under colour of a pretended sale:—*Held*, that the fact of his having received such goods with knowledge that B. had no authority to sell, and that he was in fact defrauding his master, was sufficient evidence to support an indictment for larceny against A. jointly with B. *Reg. v. Hornby.* 305
8. Where a person on whom stolen property is found gives to those who find him in possession of it a reasonable account of how he came by it, it is incumbent on the prosecutor, on the trial, to show that that account is untrue. *Aliter*, if that account be unreasonable or improbable on the face of it. *Reg. v. Crowhurst.* 370
9. Where a piece of wood, which had been stolen, had been found by a constable in the possession of the prisoner five days after it was lost, who said that he had bought it of N., who lived about two miles off:—*Held*, that it was incumbent on the prosecutor to negative this explanation. *Ibid.*
10. On the trial of an indictment for larceny as a servant, it appeared that the prisoner lived in the house of the prosecutor, and acted as the nurse to his sick daughter, the prisoner having board and lodging and occasional presents for her services, but no wages. While the prisoner was so residing, the prosecutor's wife gave the prisoner money to pay a coal bill, which money the prisoner kept, and brought back a forged receipt to the coal bill:—*Held*, that the prisoner was not the servant of the prosecutor, but that this was a larceny of the money. *Reg. v. Smith.* 423
11. A. had agreed to buy straw of B., and sent his servant C. to fetch it. C. did so, and put down the whole quantity of straw at the door of A.'s stable, which was in a court-yard of A., and then went to A., and asked him to send some one with the key of the hay-loft, which was over the stable, which A. did, and C. put part of the straw into the hay-loft, and carried the rest away to a public-house, and sold it:—*Held*, that this carrying away of the straw by C., if done with a felonious intent, was a larceny, and not an embezzlement, as the delivery of the straw to A. was complete when it was put down at the stable-door. *Reg. v. Hayward.* 518
12. A. was supplied with a quantity of pig-iron by B. & Co., his employers, which he was to put into a furnace to be melted, and he was paid according to the weight of the metal which ran out of the furnace and became puddle bars. A. put the pig-iron into the furnace, and also put in with it an iron axle of B. & Co., which was not pig-iron; the value of the axle to B. & Co. was 7s., but the gain to the prisoner by melting it and thus increasing the quantity of metal which ran from the furnace was 1d.;—*Held*, that, if the prisoner put the axle into the furnace with a felonious intent to convert it to a purpose for his own profit, it was a larceny. *Reg. v. Richards.* 532
13. A. was indicted in one count for stealing a cheque, and in another count for stealing a piece of paper. It was proved that the G. W. R. Co. drew in London a cheque on their London bankers, and sent it to one of their officers at Taunton to pay a poor's rate there, and he at Taunton gave it to the prisoner, a clerk of the company, to take to the overseer, but, instead of doing so, he converted it to his own use:—*Held*, that, even if the cheque was void under the 13th section of the stat. 55 Geo. 3, c. 184, the prisoner might be properly convicted on the count for stealing a piece of paper. *Reg. v. Perry.* 725

LARCENY IN A DWELLING-HOUSE.

1. A person who in his own dwelling-house steals the goods of another to the value of £5, may be convicted of larceny in a dwelling-house to the value of £5, under the stat. 7 Will. 4 & 1 Vict., c. 90, s. 2. *Reg. v. Bowden.* 137
2. A member of a club was indicted for stealing some of the plate used at the club-house. The house-steward slept in the house, and he stated, that he had the charge of all the plate, and was responsible for it;

but it appeared that the plate was delivered every night to the under-butler, who was appointed by the club; and by him placed in a chest in a pantry. The indictment described the property as the goods of the house-steward, and alleged it to have been stolen in his dwelling-house:—*Held*, that upon the evidence, it was wrong in both respects, inasmuch as his sleeping in the house was only as a servant of the club; and his alleged responsibility was not coupled with any custody of the property, either by himself or by his own servants. *Reg. v. Ashley.* 198

LEAVING A SEAMAN ASHORE.

In an indictment against the master of a merchant ship, on the stat. 5 & 6 Will. 4, c. 19, for wilfully and wrongfully leaving a seaman behind before the termination of the voyage for which he was shipped, the allegation of ownership is a material allegation, and must be proved as laid; and the only defence which the master can set up is, the production of a certificate of the consul or other party mentioned in the statute, or proof that it was impossible to obtain such certificate. *Reg. v. Dunnett.* 425

LETTER.

See POST-OFFICE. THREATENING LETTER.

LETTER OF ATTORNEY.

See POWER OF ATTORNEY.

LIBEL.

1. In case for a libel against a co-partnership, the jury may take into their consideration, in estimating the damages to which the plaintiffs are entitled, the prospective injury which may accrue to the partnership from the defendant's act. *Gregory v. Williams.* 568
2. In an action for a libel, charging the plaintiff with a false and malicious prosecution, in which the defendants pleaded that the statements in the alleged libel are true, evidence is not receivable of statements made by witnesses examined before the magistrates on behalf of the prosecution, in order to show *quo animo* the prosecution was conducted. *Newton v. Rowe.* 616

LIEN.

See TROVER, 5.

LIMITATION.

See COMMENCEMENT OF PROSECUTION.

LIVERY OF SEISIN.

The assent of a tenant at will is not necessary in order to perfect a livery of seisin. *Doe d. Hindmarch v. Otter.* 543

LOADED ARMS (ATTEMPTING TO DISCHARGE.)

See SHOOTING, 3.

LOST DEED.

See EVIDENCE, 30.

MAGISTRATE.

See FALSE IMPRISONMENT.

MAIMING CATTLE.

In order to constitute a maiming of a horse within the stat. 7 & 8 Geo. 4, c. 30, s. 16, it is essential that a *permanent* injury should have been inflicted on the animal. *Reg. v. Jeans.* 539

MALICIOUSLY NOT GIVING NOTICE THAT A JUDGMENT WAS SATISFIED.

1. E. having obtained a judgment against F. and T., he, by H., his attorney, sued out concurrent writs of ca. sa. into London and Surrey. F. was taken on the former writ, and, on giving to H. a promissory note jointly with B. as his surety, was discharged. No notice of this was given to the sheriff of Surrey, and he took T. on the other writ of ca. sa. In an action against H. for maliciously omitting to give notice to the sheriff of Surrey, that the judgment had been satisfied by the arrangement with F.:—*Held*, that, to support this action, the jury must be satisfied that there was malice; but that to constitute malice it was not necessary that H. should have acted from any spite or ill-will, or the like, but that, if he acted as he did from any indirect motive, such as to get the debt for his client from T., or to get more costs for himself, that would be malice for this purpose. *Held*, also, that the mere fact of H. not giving notice to the sheriff of Surrey that the judgment had been satisfied was one from which alone the jury might infer malice; but that, if they thought that H. had been defrauded when he received the promissory note, or had taken it on a representation that the parties were solvent when they were not so, this would go to negative the malice. *Tebbutt v. Holt.* 290

2. In an action for maliciously omitting to give notice to the sheriff that a judgment had been satisfied by another co-defendant, whereby the plaintiff was taken in execution after the judgment had been satisfied, the jury found for the plaintiff, with nominal damages. The judge would not certify, under the stat. 3 & 4 Vict., c. 24, that the grievance was wilful and malicious, and would not receive affidavits either in support or in opposition to the application. *Ibid.*

MANSLAUGHTER.

See ASSAULT, 3. INDICTMENT, 3. INQUI-SITION.

1. *Seemle*, if A. kill B. under provocation of a blow not sufficiently violent in itself to render the killing manslaughter, but the blow be accompanied by very aggravating words and gestures, that will be hnt manslaughter in A. *Reg. v. Sherwood.* 556
2. Where husband and wife are separated by common consent, the husband granting the wife a stipulated allowance, which is regularly paid, he is not bound to supply her with shelter; but if he knows, or be informed that she is without shelter, and refuses to provide her with it, in consequence of which her death ensues—

Semble, that he is guilty of manslaughter, (even though the wife be labouring under disease which must ultimately prove fatal,) if it can be shown that her death was accelerated for want of the shelter which he had denied. *Reg. v. Plummer*. 600

MAP.

In the trial of an indictment for the non-repair of a highway, a map of the parish, produced from the parish chest, (which map was made under an enclosure act, which was a private act, not printed,) is not receivable in evidence to show the boundaries of the parish, without proof of the enclosure act; but it being proved by the surveyor who made the map thirty-four years before the trial, that he laid down the boundaries of the parish from the information of an old man, then about sixty, who went round and showed them to him:—*Held*, that, on this proof, the map would have been receivable as evidence of reputation, if it had been also proved that the old man was dead at the time of the trial, but that it was not receivable at all without proof of his death. *Reg. v. The Inhabitants of Milton*. 58

MARKET OVERT.

See STOLEN GOODS. TROVER, 2.

MARRIAGE.

See BIGAMY, 1, 4. EVIDENCE, 22.

MARRIAGE (BREACH OF PROMISE OF.)

See RIGHT TO BEGIN, 3.

1. If a man enter into a promise of marriage in ignorance of the fact that the woman has had an illegitimate child, and discovers that before the marriage, and on that ground declines entering into the marriage, he has a right to do so, although the transaction as to the child may have taken place ten or more years ago, and the conduct of the woman may have been since perfectly correct; but, if the man knew, or had reason to know, at the time of the promise, that the woman had such a child, and gave that afterwards as his reason for refusing to marry, that would be no defence in point of law to an action for breach of promise of marriage. *Bench v. Merrick*. 463

2. Form of plea that the parties agreed to exonerate each other from the promise. 148
3. Form of plea that the defendant broke his promise because the plaintiff was of unchaste behaviour. 464 (a)
4. The like plea because the plaintiff was of intemperate habits. 465, n.

MASTER AND SERVANT.

See PUPIL AND ASSISTANT. SERVANT.

MINE.

A was charged with drowning a mine, which, in the first count of the indictment, was laid to be the mine of "J. P. and others;" in the second count, as the

mine of J. D. C.," and in the third as the mine of "R. P." J. P. and his two brothers were the lessees of the mine, but left off working it a few days before the offence, when R. R. worked it, and his name was put on the carts instead of the name of P. R. R. stated that he worked the mine for the benefit of J. D. C., who was trustee for the North and South Wales Banking Company under a deed. No deed was proved at the trial. A. was convicted, and the judges held the conviction right.

Semble, that there was evidence to support each of the three modes of laying the property. *Reg. v. Jones*. 181

MISDEMEANOUR.

See JUDGMENT.

If A. counsel and encourage B. to set fire to a malt-house, and B. attempt to set it on fire, both may be jointly indicted as principals for the misdemeanour of attempting to set the malt-house on fire, although A. was not present at the time of the attempt. *Reg. v. Clayton*. 128

MISJOINDER.

A misjoinder in the declaration is no ground for nonsuiting the plaintiff at the trial. *Lamb v. Newbiggin*. 549

MORTGAGE.

See BANKRUPT, 4.

MURDER.

See INDICTMENT, 3, 4, 7.

Where two persons go out to fight a deliberate duel, and death ensues, all persons who are present, encouraging and promoting that death, will be guilty of murder. And the person who acted as the second of the deceased person in such a duel may be convicted of murder, on an indictment charging him with being present, aiding and abetting the person by whose act the death of his principal was occasioned. *Reg. v. Cuddy*. 210

MURDER ABROAD.

A British subject who commits a murder in a foreign country upon a person who was not a British subject, is triable in England under the stat. 9 Geo. 4, c. 31, s. 7. *Reg. v. Azzopardi*. 203

MUTINY.

If the crew, or part of the crew, of a ship combine together to resist the captain, especially if the object be to deprive him of his command, it will amount to "making a revolt," within the meaning of the stat. 11 & 12 Will. 3, c. 7, s. 9; and it would be no answer to show that there were grievances, which, by their resistance, the men sought to redress. *Reg. v. McGregor*. 429

NAME.

See INDICTMENT, 3, 4, 7.

NEGLIGENCE.

See ATTORNEY. EVIDENCE, 3, 12.

NEWSPAPER.*See* EDITOR.**NIGHT POACHING,***See* POACHING.**NOLLE PROSEQUI.**

A nolle prosequi can only be entered by the authority of the Attorney-General.
Reg. v. Dunn. 730

NON ASSUMPSIT.*See* ATTORNEY.**NONSUIT.***See* MISJOINDER.**NOTICE OF ACTION.**

1. A party, in a notice of action, may describe himself by the addition of what he really is, e. g. "dealer," although in the commitment he is described as a labourer.
Mason v. Barker. 100
2. A notice of action to a magistrate for having caused the plaintiff to be imprisoned sufficiently states the *place* if it states the place in which the plaintiff was imprisoned, although it does not state any place at which the magistrate signed any warrant or did any act which caused the plaintiff's imprisonment. Whether, in such a case, the notice must state the *form* of the intended action, *quare*.
Prickett v. Gratrex. 651

NOTICE OF DISHONOUR.*See* BILL OF EXCHANGE, 2, 6.**NOTICE OF TRIAL.***See* PRACTICE, 1. TRIAL, 2.**OFFICE COPY.***See* EVIDENCE, 31.**OPENING OF COUNSEL.**

The judge at a trial will not take the facts from the opening of the counsel on the opposite side: therefore, where it was essential to entitle the defendant to notice of action that cattle should have been distrained, the judge would not act on the opening of the plaintiff's counsel who stated that the cattle were distrained.
Machell v. Ellis. 682

OUTHOUSE.*See* ARSON, 2.**PARISH REGISTER.****DESTROYING, DEFACING, AND INJURING.***See* EVIDENCE, 22.

1. A count in an indictment on the stat. 1 Will. 4, c. 66, s. 20, which charges that the prisoner "*feloniously and wilfully did destroy, deface, and injure a parish register,*" is not bad for duplicity, and it is not necessary in such a count to allege a scienter.
Reg. v. Bowen. 551
2. The tearing off a part of a leaf of a parish register book, on which part of the leaf is written entries of baptisms, &c., by which tearing the portion of the leaf torn off is entirely detached from the book, is a

felony within the stat. 1 Will. 4, c. 66, s. 20, although the portion of the leaf thus torn off be afterwards pasted into the book, so that all the entries are as legible as before.
Reg. v. Bowen. 551

3. Form of indictment. *Ibid.*

PARTNER.*See* CONTRACT, 2. LIBEL, 1.

If the fact of a man being a dominant partner in a firm become known, and on his retiring from the firm notice of that circumstance be not given to those persons who were aware of his being such partner, he will be liable to those persons for debts contracted by the firm after his retirement therefrom.
Farrar v. Deffinsne. 580

PASS.*See* FORGERY, 3, 4.**PATENT.**

1. If, in an action for the infringement of a patent, the defendant plead not guilty, that the invention was not new, and that the specification is not sufficient; and the defendant at the trial consent to a verdict for the plaintiff, without any evidence being given, the judge will not certify, under the stat. 5 & 6 Will. 4, c. 83, s. 3, "that the validity of the patent came in question before him."
Stocker v. Rodgers. 99
2. If the inventor of a machine lend it to another in order to have its qualities tested, and that other use it for some weeks in a public workroom; this is not giving the invention such publicity as to deprive the inventor of his right to obtain letters-patent for it.
Bentley v. Fleming. 587
3. A machine does not cease to be the subject of a patent, merely because of the length of time during which the inventor may keep it by him, after it has been made a complete workable machine.
Ibid.

PAYMENT.*See* RIGHT TO BEGIN, 5.**PERJURY.***See* FALSE DECLARATION. TRAVERSE, 4.

1. An indictment for perjury alleged to have been committed on the trial of an action of debt, brought and tried in a county court, stated, in the first count, that the county court was holden before H. M. B., Esq., the high sheriff, and the oath sworn before him; in the second count that the county court was holden before C. J. B., gent., the county clerk, and the oath sworn before him; and in the third count that the county court was held before C. J. B., gent., the county clerk and the suitors, [naming them,] and the oath sworn before C. J. B., "so being such county clerk as aforesaid, and T. J., [naming them,] suitors of the said court of the said sheriff as aforesaid:—" *Held*, bad, as the county court was misdescribed in each of the counts, and that the fact of the county clerk being also a

- freeholder of the county made no difference. *Reg. v. Fellowes.* 115
2. An indictment for perjury stated, that H. L. stood charged by F. W., before T. S., clerk, a justice of the peace, with having committed a trespass, by entering and being in the daytime on certain land in pursuit of game, on the 12th of August, 1843; and that T. S. proceeded to the hearing of the charge, and that, upon the hearing of the charge, the defendant C. B. falsely swore that he did not see H. L. during the whole of the said 12th of August, meaning that he, the said C. B., did not see the said H. L. at all on the said 12th day of August, in the year aforesaid; and that, at the time he, the said C. B., swore as aforesaid, it was material and necessary for the said T. S., so being such justice as aforesaid, to inquire of and be informed by the said C. B., whether he, the said C. B., did see the said H. L. at all during the said 12th day of August, in the year aforesaid:—*Held*, that this averment of materiality was insufficient, because, consistently with this averment, it might have been material for T. S. in some other matter, and not in the matter stated to have been in issue before him, to have put this question, and received this answer. *Reg. v. Bartholomew.* 366
3. An indictment for perjury, removed by certiorari, came on to be tried as a *Nisi Prius* record. As soon as the jury were sworn, the defendant asked to have the indictment read at length to the court and jury. The judge directed it to be done. *Reg. v. Newton.* 469
4. An indictment for perjury in an affidavit stated the affidavit to have been sworn "before one R. G. W., then and there being a commissioner duly authorized and empowered to take affidavits in the said county of Gloucester, in or concerning any cause depending in her said Majesty's Court of Exchequer at Westminster." It was proved by Mr. R. G. W., that he had acted as a commissioner for taking affidavits in the Exchequer for ten years, but had never seen his commission; and that ten years ago he applied to his agent to procure for him a commission to take affidavits in the Exchequer, and that his agent had told him that he had done so:—*Held*, that the proof of Mr. R. G. W.'s acting as a commissioner was *prima facie* evidence that he was so. *Ibid.*
5. On an application to a judge to discharge A. from custody on a ca. sa., A. made an affidavit, in which he stated, that he had been previously taken in execution on the same judgment, and discharged by order of the plaintiff's attorney; and that, in order to make the second arrest, the back door of his house had been broken open. A. being indicted for perjury on this affidavit, the indictment in setting out the affidavit alleged, that the defendant swore and made affidavit, that G. W., the officer who made the second arrest, "was appointed for the purpose of such occasion

- only, at the special instance and part of the said plaintiff;" and that G. W. "made efforts to break the front hall-door of the said dwelling-house," and "then went round to the door of the back-kitchen of deponent's said dwelling-house, which is the only outer door of the same." The affidavit itself stated, that G. W. was appointed "at the special instance and peril of the said plaintiff," and that G. W. "went round to the door of the back-kitchen of deponent's said dwelling-house, which is the only other outer-door of the same." It being objected, that these were variances, the judge allowed them to be amended under the stat. 9 Geo. 4, c. 15, as neither of the assignments of perjury were at all affected by these misrecitals of the affidavits, and therefore these misrecitals could not affect the merits of the case. *Reg. v. Newton.* 469
6. A person may be indicted for perjury who gives false evidence before a grand jury when examined as a witness before them upon a bill of indictment, and another witness on the same indictment, who is in the grand jury-room, while such person is under examination, is competent to prove what such witness swore before the grand jury, and so is a police-officer who was stationed within the grand jury-room-door to receive the different bills at the door, and take them to the foreman of the grand-jury; these persons not being sworn to secrecy, although the grand-jury are so. *Reg. v. Hughes.* 519
7. To convict a person of perjury in swearing falsely before a grand-jury, it is not sufficient to show that the person swore to the contrary before the examining magistrate, as *non constat*, which of the contradictory statements was the true one. *Ibid.*
8. Form of indictment. *Ibid.*
9. An indictment for perjury alleged to have been committed on a writ of trial, stated the trial to have taken place before the high sheriff. It was proved, that, when the defendant gave evidence on the writ of trial, neither the high sheriff, nor the under-sheriff, were present; but that the writ of trial was executed before Mr. S., the sheriff's assessor, who was proved to have been in the constant practice of acting as the sheriff's assessor and deputy, but the writ of trial was directed to the sheriff, and it was stated in the postea that the trial took place before him:—*Held*, that the allegations in the indictment was supported, and that it sufficiently appeared that Mr. S. had authority to execute the writ of trial. *Reg. v. Dunn* 730
10. Form of indictment. *Ibid.*

PLEA IN ABATEMENT.

See PLEADING, 4.

PLEA PUIS DARREIN CONTINUANCE.

See PLEADING, 2.

PLEADING.

See ATTORNEY. EXECUTORS AND ADMINISTRATORS, 1.

1. A. entered into a written agreement with B. to let him a house for a year, and therein stipulated that if B. expended money in repairing the house, and A. did not at the end of the year grant to or procure for B. a lease of the house for seven years, A. would repay to B. half the amount of the repairs, not exceeding £40, within the year. B. expended money in repairs, and had paid the workmen, and A. neither granted nor procured the lease:—*Held*, that B. could not, on a common count for money paid, recover the half of the amount of the repairs under the agreement, but that the declaration must be special. *Thurnell v. Symonds*. 44
2. *Semble*, that a plea puis darrein continuance at Nisi Prius should be tendered to the judge within the eight days allowed by the Reg. Gen. of Hilary term, 1834, though the cause may not have reached in its turn. *Thomson v. Smith*. 160
3. Where issue is taken on an averment in a declaration, that the plaintiff was "ready and willing and able" to do a certain act, the defendant may show thereunder any circumstance—such as the insanity of the plaintiff—which disqualified him from doing the act in question. *Kirtley v. Cope-land*. 319
4. A plea in abatement to an action *ex contractu* must, to be a good plea, set forth the names of *all* the parties with whom the defendant was joined as a co-contractor. *Croftin v. Brook*. 571

Pleadings (Forms of.)

1. Plea in action for breach of promise of marriage, that the parties agreed to exonerate each other from the promise. 148
2. Plea in the like action that the plaintiff was of unchaste behaviour. 464 (a)
3. The like, but that the plaintiff was of intemperate habits. *Ibid*.
4. Declaration for maliciously omitting to give notice that a judgment was satisfied. 282 (a)
5. Declaration against an innkeeper for not receiving a guest. 404 (a)
6. Pleas in that action that the defendant did not hear the plaintiff knock at the inn door, and that there was no room in the inn. *Ibid*.
7. Declaration against a commissioner of a Court of Requests for acting without a qualification. 408 (b)
8. Declaration by the administrator of a legatee, for a legacy which the executor was to hold, paying interest for it. 642 (a)
9. Plea justifying the dismissal of a pupil and assistant to a surgeon for misconduct, and injuring his employer's practice. 665

Form of Indictments.

1. For making a false declaration under the stat. 5 & 6 Will. 4, c. 62, s. 13. 66 (a)
2. For false pretences to obtain money from a benefit society. 250 (a)

3. For attempt to murder, by placing a child in a bag, and hanging the bag to park palings. 497
4. For defacing, destroying, and injuring a parish register of baptism. 501
5. For perjury in swearing to that which the defendant did not know. 474 (a)
6. For perjury committed before grand jury. 520
7. For perjury on a trial had under a writ of trial. 732
8. For concealment of birth. 623
9. Against a bankrupt for not surrendering. 168

POACHING.

1. On the trial of an indictment on the stat. 9 Geo. 4, c. 69, s. 9, for night poaching, it appeared that the offence was committed on the 12th of January, 1844. The indictment was preferred on the 1st of March, 1845. The warrant of commitment by which the defendant was committed to take his trial for this offence was given in evidence: it was dated on the 11th of December, 1844:—*Held*, that it was sufficiently shown that the prosecution was commenced "within twelve calendar months after the commission" of the offence, within the 4th section of that statute. *Reg. v. Austin*. 621
2. In a case of night poaching by three or more armed, if one has a gun, all are armed within the stat. 9 G. 4, c. 69, s. 9. *Reg. v. Goodfellow*. 724

POISON (ADMINISTERING.)

See ASSAULT, 3. ATTEMPTING TO ADMINISTER POISON.

POST LETTER.

See POST-OFFICE.

POST-OFFICE (OFFENCES RELATING TO THE.)

1. A post-office being at an inn, a person was sent to put a letter, containing promissory notes, into the post. He took it to the inn with money to prepay the postage; he did not put it into the letter-box, but laid the letter, and the money upon it, upon a table in the passage of the inn, in which passage the letter-box was, and he pointed out the letter to the prisoner, who was a female servant at the inn, who said she would "give it to them." The prisoner, who was not authorized by the innkeeper, her master, to receive letters for him, stole the letter and its contents:—*Held*, that this was not a "post-letter" within the stat. 7 Will. 4 & 1 Vict., c. 36, ss. 27, 23, and that the stealing of the letter and its contents by the prisoner was not an offence within either of those sections. *Reg. v. Harley*. 99
2. Mr. R., an officer in the post-office in London, intending to try the honesty of A. G., the post-mistress of Enstone, went to Oxford, and having put marked money into a letter, directed to "Thomas Hicks, Radford Lane, Exeter," placed this letter in a bundle of letters in the Oxford post-office, which was to go to the Enstone

post-office. This letter going in the bundle of letters to the Enstone post-office, A. G. took out the marked money and denied any knowledge of the letter. Mr. R. neither knew any person named Thomas Hicks, nor that there was any such place as Radford Lane in Exeter:—*Held*, that this was not a stealing of a "post-letter" within the stat. 1 Vict., c. 36, but that the taking of the money by A. G. was a larceny. *Reg. v. Gardiner.* 628

POSTPONING TRIAL.

1. If it is moved, on the part of the prosecution in a case of felony, to put off the trial, on the ground of the absence of a material witness, who has not made a deposition before the committing magistrate, the judge will require an affidavit stating what points the witness is expected to prove, in order that he may form a judgment as to the witness being material or not. *Reg. v. Savage.* 75
2. An affidavit of a surgeon, that a witness is the mother of an unweaned child, which is afflicted with inflammation of the lungs, and that the child could neither be brought to the assize town nor separated from its mother without danger to its life, is sufficient ground for the absence of the witness, in order to found a motion to postpone the trial. *Ibid.*
3. *Seemle*, that a trial for felony may be postponed on application by the prisoner, on sufficient cause shown by affidavit, after the jury have been charged with the indictment, and before any evidence has been given in the case. *Reg. v. Fitzgerald.* 201
4. A defendant cannot be presumed to know what evidence will be required until after issue joined; and, therefore, where it appeared, that, between that time and the first day of the assizes, due diligence had been used to procure the attendance of a material and necessary witness, but without effect, the judge ordered the trial to be put off, on the defendant bringing the money into court and paying costs. *Dale v. Heald.* 314

POUND.

See CRUELTY TO ANIMALS.

POWER OF ATTORNEY.

A person who pays money to another, who is authorized to receive it by a power of attorney, is not entitled to keep possession of the power of attorney. *Fridmore v. Harrison.* 613

PRACTICE.

See ADDRESSING THE JURY. IDENTIFYING PRISONERS. INDICTMENT, 6. JUDGMENT. POSTPONING TRIAL. REPLY. RIGHT TO BEGIN. TRIAL.

Where countermand of notice of trial is given after the commission day, and the record is not withdrawn, the proper course is, on the cause being called on, to nonsuit the plaintiff. *Haworth v. Whalley.* 586

PREVIOUS CONVICTION.

1. A certificate of a previous conviction under the stat. 7 & 8 Geo. 4, c. 28, s. 11, must state that judgment was given. *Reg. v. Ackroyd.* 158
2. Where a prisoner is indicted for a felony after a previous conviction under 7 & 8 Geo. 4, c. 28, s. 11, it is sufficient to allege in the indictment that the prisoner was "convicted of felony," without stating the judgment. *Reg. v. Spencer.* 159

PRINCIPAL AND ACCESSARY.

See ACCESSARY.

PRINCIPAL AND AGENT.

See AGENT.

PRINCIPALS IN OFFENCE.

See COIN, 4. MISDEMEANOUR.

PRISONER'S PASS.

See FORGERY, 3, 4.

PROMISE OF MARRIAGE. (BREACH OF.)

See RIGHT TO BEGIN, 3.

Form of plea that the parties agreed to exonerate each other from the promise. 148

PROMOTIONS, 444, 620, 751.

PROOF OF FOREIGN LAWS.

See FOREIGN LAWS.

PROSECUTION (COMMENCEMENT OF.)

See COMMENCEMENT OF PROSECUTION.

PROSECUTION (GOVERNMENT.)

See REPLY.

PUIS DURREIN CONTINUANCE.

See PLEADING, 2.

PUPIL AND ASSISTANT.

1. A person has a right to dismiss a *servant* for misconduct, but has no right to turn away an *apprentice* because he misbehaves; but the case of a young man seventeen years old, who, under a written agreement not under seal, is placed with a surgeon, as "*pupil and assistant*," and with whom a premium is paid, is a case between that of apprenticeship and service; and if such a person on some occasions come home intoxicated, *this alone* will not justify the surgeon in dismissing him. But if the pupil and assistant by employing the shop-boy to compound the medicines, occasion real danger to the surgeon's practice, this would justify the surgeon in dismissing him. *Wise v. Wilson.* 662
2. Form of plea. *Ibid.*

QUASHING INDICTMENT.

See TRAVERSE, 4.

RAILWAY.

1. A. was tenant of a farm over which two railways passed, in respect of which tenant's damages were payable to the owner of the land, or to his lessees or tenants. A. received the money;—*Held*, that, if the land covered by the railways passed to A.

by the agreement under which he became tenant, the owner could not recover that money as money had and received to his use. *Wilson v. Anderson.* 544

2. A railway act imposed a penalty on the company for the interruption of any road, and, in the case of a private road, made the penalty "payable to the owner thereof."—*Held*, that the tenant of the farm over which the road passed could not sue for the penalty. The same act enacted, that any penalty imposed thereby, the recovery of which was not otherwise provided for, might be recovered by summary proceeding, upon complaint before two or more justices:—*Held*, that this did not bar the party entitled from his remedy by action at law. *Collinson v. Newcastle and Darlington Railway Company.* 546

RAPE.

See ABUSING FEMALE CHILDREN. ASSAULT; 7.

1. If, on the trial of an indictment for carnally knowing and abusing a female child under ten years old, the jury are satisfied, that, at any time, any part of the virile member of the prisoner was within the labia of the pudendum of the child, no matter how little, this is sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offence. *Reg. v. Lines.* 393
2. On the trial of an indictment for rape, the prosecutrix, a servant, stated that she made almost immediate complaint to her mistress, and that on the next day a washerwoman washed her clothes, on which were blood. Neither the mistress nor the washerwoman were under recognisance to give evidence, nor were their names on the back of the indictment, but they were at the assizes attending as witnesses for the prisoner. The judge directed that both the mistress and the washerwoman should be called by the counsel for the prosecution, but said that he should allow the counsel for the prosecution every latitude in their examination. *Reg. v. Stroner.* 650
3. On a trial for a rape, it was proved that the prisoner made the prosecutrix quite drunk, and that when she was in a state of insensibility the prisoner took advantage of it, and violated her. The jury convicted the prisoner, and found that the prisoner gave her the liquor for the purpose of exciting her, and not with the intention of rendering her insensible, and then having sexual intercourse with her.—The fifteen judges *held*, that the prisoner was properly convicted of rape. *Reg. v. Campkin.* 746

RECEIVER.

W. stole a watch from A., and while W. and L. were in custody together, W. told L. that he had "planted" the watch under a flag in the soot-celler of L.'s house; after this L. was discharged and went to the flag and took up the watch, and sent his wife to pawn it:—*Held*, that, if L. thus took the watch in consequence of W.'s

information, W. telling L., in order that he might use the information by taking the watch, L. was indictable for this as a receiver of stolen goods, but that if this was an act done by L. in opposition to W., or against his will, it might be a question whether it would be a receiving. *Reg. v. Wade.* 739

RECEIPT.

See EVIDENCE, 21. FORGERY, 7.

A receipt for 2l., 2s., "being the balance of account up to this day for houses in W.-road," requires a 10s. stamp. *Birt v. Leigh.* 611, 752

REGISTER.

See EVIDENCE, 22. PARISH REGISTER.

REPLY.

In a prosecution by the Post-office for a felony, it being stated by the counsel for the prosecution that he appeared as representative of the Attorney-General,—*Held*, that, on the ground of his representing the Attorney-General, he was entitled to reply without reference to the prisoner's having called witnesses, or not. *Reg. v. Gardner.* 628

REVOLT.

See MUTINY.

RIGHT TO BEGIN.

1. In an action for selling oil for the hair in bottles and with envelopes resembling those of the plaintiffs, the defendants pleaded that the oil sold by the plaintiffs was prepared from oil of an inferior quality, and was useless and valueless, and that the plaintiffs knew it, and that the oil sold by the plaintiffs was by reason thereof a fraud on all persons buying the same. The plaintiffs replied *de injuriâ*:—*Held*, that, on these pleadings, the defendant was entitled to begin. *Rowland v. Berens.* 46
2. In ejectment where the lessor of the plaintiff claimed as heir of W. L., and the defendant claimed the whole property as devisee under the will of W. L., and part of it also under the marriage settlement made on her marriage with W. L.:—*Held*, that the defendant's admitting at the trial that the lessor of the plaintiff was the heir of W. L., did not entitle the defendant to begin; but that if the defendant had claimed title under the will only, and had admitted the title of the lessor of the plaintiff as heir, it would have been otherwise. *Doe d. Lewis v. Lewis.* 122
3. If in an action for breach of promise of marriage the defendant plead that, before any breach of the promise, the parties mutually agreed to exonerate each other from their promises, and this be denied by the replication:—*Held*, that on these pleadings the defendant is entitled to begin. *Stanton v. Paton.* 148
4. In replevin, the defendant avowed the taking as a distress for an annuity. The plaintiff pleaded, that no memorial of the annuity was enrolled. Replication, that a memorial of the date of the indenture and of the names of the parties and wit-

nesses, and of the parties by whom the annuity was to be beneficially received, and of the consideration, [setting out the memorial,] was enrolled. Rejoinder, that the memorial did not truly state the names of the persons by whom the annuity was to be received, and the considerations, but was untrue in this, that J. B. was not the only person by whom the annuity was to be beneficially received, [denying separately the statements of the memorial.] Sur-rejoinder, that the memorial did truly state the names of the persons by whom the annuity was to be beneficially received, and the considerations:—*Held*, that, on these pleadings, the defendant must begin. *Hogarth v. Penny.* 608

1. In debt, the declaration was for £40 for goods sold, and for £40 on an account stated; the particulars of demand were for a balance of 294. 10s., but in the particulars no credits were given or dates specified. The defendant pleaded a general plea of payment to the whole declaration:—*Held*, that, under these circumstances, the defendant must begin. *Birt v. Leigh.* 611

5 In assumpsit for wrongfully dismissing a "pupil and assistant" to a surgeon, the defendant pleaded that the pupil and assistant so misconducted himself as to make it necessary to dismiss him, to prevent his ruining the defendant's practice, and the plaintiff replied *de injuria*:—*Held*, that, on these pleadings, the plaintiff was entitled to begin. *Wise v. Wilson.* 662

SALE BY SAMPLE.

See CUSTOM OF TRADE, 1, 2.

SAMPLE.

See CUSTOM OF TRADE, 1, 2.

SEAMAN.

See LEAVING A SEAMAN ASHORE. MUTINY.

SEISIN.

See EVIDENCE, 21. LIVERY OF SEISIN.

SEQUESTRATION.

See BANKRUPT (SCOTLAND.)

SERVANT.

See AGENT. CONTRACT, 2. EVIDENCE, 8. LARCENY, 7, 10, 11, 13. PUPIL AND ASSISTANT. TROVER, 1, 2, 8.

SHEEPSTEALING.

On the trial of an indictment for stealing "one sheep," some of the witnesses stated the animal to be a sheep, others a lamb. It was between nine and twelve months old, and the jury who convicted the prisoner found that, in common parlance, according to the usual mode of describing such animals, it would be called a lamb. The fifteen judges held the conviction right, the word "sheep" being general. *Reg. v. Spicer.* 699

SHERIFF.

See PERJURY, 1, 9. WITNESS, 3.

1. In an action by a sheriff for his poundage,

proof that he has acted as sheriff is sufficient evidence of his being so, without proof of his appointment. *Bunbury v. Matthews.* 380

2. In an action for sheriff's poundage, the sheriff's officer produced the sheriff's warrant under which he had acted, which concluded, "given under the seal of my office." The only seal to it was a small piece of blue paper wafered to it, and stamped with a wafer stamp. The officer stated that he did not know this to be the seal of the sheriff, or of his office, but stated that he had received the warrant from Mr. B., who had acted as the plaintiff's under-sheriff, and that it was precisely similar to all the other warrants on which he had acted:—*Held*, sufficient proof of the seal. *Ibid.*

3. *Seem*, that the stat. 5 & 6 Vict., c. 98, which provides, that, after the 1st of March, 1843, sheriff's poundage shall not be "payable" on writs of *ca. sa.*, does not apply to cases where the party has been taken on the *ca. sa.* before that day; but if it does, a defendant, in an action for sheriff's poundage, cannot take advantage of that defence on the plea of *nonquam indebitatus*, but must plead it specially. *Ibid.*

SHERIFF'S ASSESSOR.

See PERJURY, 9.

SHIPPING.

See CHARTERPARTY. LEAVING A SEAMAN ASHORE. MUTINY.

In an action against the owner of a ship, to recover money advanced to the captain for the use of the ship whilst in a home port:—*Held*, that the only question for the jury was, whether, under the circumstances, the captain's position was such as to constitute him the authorized agent of the owner, in order to procure such advances, and that the state of the accounts between the captain and the owner at the time had nothing to do with the case. *Williamson v. Page.* 581

SHOOTING.

1. An indictment which charges that the prisoner feloniously assaulted J. H., and by feloniously "drawing the trigger of a certain pistol, loaded with gunpowder and a leaden bullet, then and there feloniously and maliciously did attempt to discharge the said pistol at the said J. H.," with intent to murder him, is good, without stating: that "the said pistol" was so loaded as aforesaid. *Reg. v. Baker.* 254

2. If on the trial of an indictment for feloniously attempting to discharge a loaded pistol at another, by drawing the trigger, the jury think that the pistol was not so primed and loaded that it could go off, they should acquit the prisoner, and ought not to find him guilty of an assault under the 11th section of the stat. 7 Will. 4 & 1 Vict., c. 85. *Ibid.*

3. A rifle which is loaded, but which for want of proper priming will not go off, is

not a "loaded arm" within the stat. 1 Vict., c. 85, s. 3; and the pointing a rifle thus circumstanced at a person, and pulling the trigger of it, whereby the cock and hammer were thrown, and the pan opened, will not warrant a conviction either of felony under the 3d section, or of assault under the 11th section, of the stat. 1 Vict., c. 85. *Reg. v. James.* 530

SHOP.

See BREAKING INTO A SHOP.

SLAVE TRADE.

1. The provisions of the stat. 5 Geo. 4, c. 113, are not confined to acts done by British subjects in furtherance of the slave trade in England or the British colonies, but apply to acts done by British subjects in furtherance of that trade in places not part of the British dominions. *Reg. v. Zulweta.* 215
2. In order to convict a party who is charged with having employed and loaded a vessel for the purpose of slave-trading, it is not necessary to show that the vessel which carried out the goods was intended to be used for bringing back slaves in return; but it will be sufficient if there was a slave adventure, and the vessel was in any way engaged in the advancement of that adventure. *Ibid.*
3. Where a party living in London was charged with having chartered a vessel and loaded goods on board for the purposes of slave-trading, it was *held*, that the slave-trading papers found on board the vessel when she was seized in foreign parts, but not traced in any way to the knowledge of such party, were not admissible in evidence against him. *Ibid.*

SOCIETY.

- Any society may make any rules by which the admission and expulsion of its members are to be regulated, and the members must conform to those rules; but where there is not any property in which all the members of the society have a joint interest, and where there is no rule as to expulsion, the majority may, by resolution, remove any member; but, before that is done, notice must be given to him to answer the charge made against him, and an opportunity given to him for making his defence; where, therefore, a member of such a society had used menacing language towards another member of the society, and for this a majority of a general meeting of the society voted that he should no longer be considered a member of the society, but did not give him any notice of the intention to take his conduct into consideration, or any opportunity of making his defence:—*Held*, that this expulsion was invalid, and that he was still a member of the society. *Jones v. Wylie.* 257

SPEEDY EXECUTION.

See BILL OF EXCEPTIONS.

STAMP.

See COURT ROLL. RECEIPT.

STEALING POST LETTERS.

See POST-OFFICE.

STOLEN GOODS.

Books were stolen from A. which were afterwards bought by B. who did not know that they were stolen:—*Held*, that A. might maintain trover for them against B., although A. had taken no steps towards bringing the thief to justice. *Whites v. Spettigue.* 673

SUBSCRIBING WITNESS.

See EVIDENCE, 8.

SURVEYOR.

See HIGHWAY, 2, 3.

SUMMONS.

See CONVICTION, 3, 4.

TENANT IN COMMON.

The statute 3 & 4 Will. 4, c. 27, s. 12, operates to make the possession of tenants in common a separate possession, from the time they first became tenants in common, and not merely from the time of the passing of that statute. *Doe d. Holt v. Horrocks.* 566

TENDER.

Mr. A., the plaintiff's attorney, wrote to the defendant, stating that a debt due from the defendant to the plaintiff "must be paid to me" on the next day.—A tender was made on the next day to a writing clerk of Mr. A., in Mr. A.'s office, who said that he could not take the money, as Mr. A. was out, and the person must wait till he came:—*Held*, not a good tender, as not being made to a person authorized to receive money; but that, if Mr. A.'s letter had asked payment "at my office," a tender to any person in the office who was carrying on the business there would have been sufficient. *Watson v. Haherington.* 36

THEATRE.

See LANDLORD AND TENANT, 1.

1. The public, who go to a theatre, have a right to express their free and unbiassed opinions of the merits of the performers who appear upon the stage; but parties have no right to go to a theatre, by a preconcerted plan to make such a noise that an actor, without any judgment being formed of his performance, should be driven from the stage; and if two persons are shown to have laid a preconcerted plan to deprive a person who comes out as an actor of the benefits which he expected to result from his appearance on the stage, they are liable in an action for a conspiracy. *Gregory v. Duke of Brunswick.* 24
2. In an action for a conspiracy to hiss an actor, the defendants cannot, under the general issue, give in evidence libels published by the plaintiff, with a view of showing that the plaintiff was hissed on

account of those libels, and not by reason of any conspiracy of the defendants. *Gregory v. Duke of Brunswick.* 24

THREATENING LETTER.

1. The words "without any reasonable and probable cause," in the stat. 7 & 8 Geo. 4, c. 29, s. 8, concerning sending threatening letters, &c., apply to the money demanded, and not to the accusation threatened to be made. *Reg. v. Hamilton.* 212
2. A. wrote a threatening letter addressed to Sir J. R., threatening to burn the house, &c. of Mr. B., a tenant of Sir J. R. A. left the letter, which was sealed, at a gate in a road near Sir J. R.'s house, where it was found and taken to the steward's room at Sir J. R.'s, where it was opened and read by the steward, and by him given to E., a constable, by whom it was afterwards shown to Sir J. R. and to Mr. B.:—*Held*, that if, in thus leaving the letter, the prisoner intended the letter should not only reach Sir J. R., but also reach Mr. B., this was a "sending" of the letter to Mr. B., within the stat. 4 Geo. 4, c. 54, s. 3. *Reg. v. Grimwade.* 592

TRADE (CUSTOM OF.)

See CHARTERPARTY, 2, 3. CUSTOM OF TRADE.

TRAVERSE.

1. A. was indicted for speaking seditious words. He had been committed more than twenty days before, for having unlawfully caused a great number of persons unlawfully to assemble to disturb the peace, and having with those persons assembled and met together for the purpose aforesaid, to the terror of her Majesty's subjects:—*Held*, that A. was entitled to traverse, as the indictment was not for the same offence as that for which he had been committed, although both the indictment and the commitment related to the same transaction. *Reg. v. O'Neill.* 138
2. The 5th sect. of the 60 Geo. 3 & 1 Geo. 4, c. 4, relating to the trial of misdemeanours, does not require a formal notice to be given by the prosecutor to the defendant, but is intended to prevent his being taken by surprise. Therefore, if it come to the defendant's knowledge twenty days before the next session that the indictment had been found against him at the last session, he is bound to plead and try. *Reg. v. Gregory.* 208
3. An indictment had been found at the assizes in 1840 against A., the clerk of the course at Ascot, for a misdemeanour, in keeping a gaming-booth there. In 1844 he was taken on a judge's warrant, founded on that indictment, and gave bail to appear at the next assizes, and there plead to the indictment and take his trial. He appeared at the next assizes, and it was shown by affidavit, that the prosecutor could not be found, so as to be served with notice of trial:—*Held*, that the defendant could not be acquitted, as no notice of

trial had been given; but, on the defendant surrendering to the governor of the prison immediately before the end of the assizes, the judge directed the prosecutor and witnesses to be called three times; and they not answering, the judge ordered, that the defendant should be discharged by proclamation, and that he should not be called upon to enter into any fresh recognisance. *Reg. v. Hibberd.* 461

4. A. being indicted for perjury at the spring assizes, 1843, at those assizes, entered into recognisances to try at the summer assizes, 1844, but it being discovered before that time that the indictment was defective, another indictment was prepared and found at those assizes on which the prosecutor wished the defendant to be tried:—*Held*, that the defendant was entitled to have the first indictment disposed of before he could be tried on the second; but the judge quashed the first indictment, upon the terms of the prosecutor paying the defendant his costs of the traverse and recognisances, and the defendant proceeded to trial on the second indictment without traversing. *Reg. v. Dunn.* 730

TRESPASS.

1. A. directed a police officer to take B. into custody on a charge of embezzlement, and the officer having done so, the officer and A. went together to a box of B., and the officer, in the presence of A., searched the box, and took from it a sovereign:—*Held*, that, in an action by B. against A. for the trespass in opening of the box and taking the sovereign, proof of these facts was evidence to go to the jury of A.'s participation in the trespass. *Jones v. Morrell.* 266
2. A. went to the house of B., and with a hatchet broke open two doors, and took goods, alleging that he did so to distrain for rent due to his father from C. The jury gave nominal damages, and the trespass being wilful, the judge, at the trial, certified that it was "wilful and malicious," so as to entitle the plaintiff to costs under the stat. 3 & 4 Vict., c. 24, and the Court of Exchequer discharged a rule which was obtained for rescinding that certificate. The stat. 3 & 4 Vict., c. 24, as to costs in trespass, is to be construed with reference to the stat. 8 & 9 Will. 3, c. 11, s. 4. *Sherwin v. Swindall.* 402
3. In an action of trespass against five for breaking into the plaintiff's house, in which the defendants have paid money into court, the plaintiff cannot go into proof, (as evidence of malice,) that, nine months after the trespass, one of the defendants indicted him for perjury. *Newton v. Halford.* 537
4. Evidence of the conduct of the parties before the trespass, if it had reference to it, might be receivable; but not evidence of the act of one defendant done by him long after the trespass. *Ibid.*
5. In trespass against two excise officers for entering the plaintiff's house, there was

at the close of the plaintiff's case, no evidence against one of them:—*Held*, if no further evidence was given for the plaintiff, that the plaintiff's counsel, must then elect to go on as to the other defendant only, and could not wait till the defence was concluded. *Davies v. Moseley*. 710

5. In order to show, in trespass, that the defendant, an excise officer, entered the plaintiff's house, the defendant's affidavit was put in, by which he stated, that he entered the house by virtue of a magistrate's warrant, to search for malt which had not paid duty:—*Held*, that the putting in of this affidavit by the plaintiff did not make out a defence for the defendant, as the affidavit did not state that the warrant was granted upon oath made by an officer of excise, as required by the stat. 7 & 8 Geo. 4, c. 53, s. 34. *Ibid*.

TRIAL.

1. A merchant of London was indicted for a felony against the act of Parliament prohibiting slave-trading. His counsel applied to the court to allow the prisoner to sit by him, not on the ground of his position in society, but because he was a foreigner, and several of the documents in the case were in a foreign language, and it would, therefore, be convenient for his counsel to have him by his side, that he might consult him during the trial:—*Held*, that the application was one which ought not to be granted. *Reg. v. Zulusta*. 215
2. If an indictment for perjury be removed by certiorari at the instance of the defendant, and be entered for trial on the Nisi Prius side of the assizes by the defendant, the judge will not stop the case from being tried on a motion on the part of the prosecution, on the ground that the prosecutor has not had sufficient notice of trial; but, if the defendant is acquitted, no one appearing for the prosecution, it will be a mistrial if proper notice of trial had not been given. *Reg. v. Hair*. 389
3. On the Oxford circuit, the practice is, that, whenever the commission day of an assize is on any day except Saturday, the time for the entry of causes extends to twelve o'clock at noon on the day after the commission day; but where the commission day is on a Saturday, the parties must enter their causes before the sitting of the court on the following Monday, at whatever hour on that day the court may sit, the usual hour being nine o'clock. 394
4. Where the commission day announced is Saturday, but, from pressure of business at another town, the commission day be postponed till Monday, under the stat. 3 Geo. 4, c. 10, parties ought to be prepared to enter and try their causes at the sitting of the court on Monday. *Ibid*.

TRIAL (POSTPONING.)

See POSTPONING TRIAL.

TRIAL (WRIT OF.)

See PERJURY, 9.

TROVER.

See STOLEN GOODS.

1. Where A. refused to give up certain chattels when demanded by the owner, on the ground that he had purchased them from B., who was the owner's servant; and it appeared that B. had no authority to sell:—*Held*, that this was evidence of a conversion by A., although he had made the purchase *bonâ fide*, and in the belief that B. had such authority. *Metcalf v. Lumsden*. 309
2. An authority to a servant to sell in market overt is not to be construed as a continuing authority, so as to justify a sale by him elsewhere. *Ibid*.
3. If A. deliver a chattel to B. under a contract by the latter to perform certain work thereon at a fixed price, and, before such work is completed, A. countermand the order, and demand the chattel from B., at the same time tendering a sum sufficient to pay for the work actually done, he will be entitled to maintain trover for it, without tendering the contract price. *Lilley v. Barnsley*. 344
4. But, in such a case, the jury must estimate the measure and value of the work done, as if the contract had never existed. *Ibid*.
5. *Semble*, that by the custom of trade in Manchester as between calico-printers and engravers, the latter have no right of general lien for balances due to them from the former. *Ibid*.
6. A written notice of demand, to deliver up certain deeds, was served on three defendants at different times and places:—*Held*, that it was for the jury to say, from the whole of the evidence, whether the defendants had not previously agreed to act in such a manner, with reference to the deeds in question, as to render their refusal, although separately given, evidence of a joint conversion. *Atkin v. Slater*. 356
7. On one of the defendants being served with notice of demand, he merely said, "that he would consult his attorney:"—*Held*, that this expression, coupled with his subsequent conduct in not giving up the deeds, amounted to evidence of a conversion. *Ibid*.
8. A horse of the plaintiff was confined in the farm-yard of the defendant, at a farm at which he did not reside, and the defendant's farm bailiff, who resided at this farm, directed the horse to be sold at a neighbouring market; whether in trover this is evidence of a conversion by the defendant, *quære*. *Mackell v. Ellis*. 682

USAGE.

See EDITOR.

USAGE OF TRADE.

See CHARTERPARTY, 2, 3. CUSTOM OF TRADE.

USE AND OCCUPATION.

See LANDLORD AND TENANT, 1.

VENDOR AND PURCHASER.

An outstanding docketed judgment not registered pursuant to the provisions of the stats. 1 & 2 Vict., c. 110, s. 19, and 2 & 3 Vict., c. 11, ss. 2 and 3, is not a valid objection to the title of a vendor on the sale of realty. *Bedford v. Forbes.* 33

WEIGHTS AND MEASURES.

1. An inspector of weights and measures, appointed under the 5 & 6 Will. 4, c. 63, does not require a special warrant, in order to authorize him to act in each individual case, his general warrant under sect. 28 being sufficient for that purpose. *Kershaw v. Johnson.* 329
2. By sect. 21 of that act, no weight above 56 lb. is required to be inspected and stamped; but the inspector may still enter places within the meaning of the act, in order to inspect, &c., although no weight of 56 lb. or under be kept therein. *Ibid.*
3. Under the 28th section an inspector is not authorized in seizing any weight, without having first compared it with the standard, in order to ascertain whether it be just or not. *Ibid.*
4. *Semble*, that it is not necessary, in order to justify an inspector in entering under the 28th section, that the place into which he enters should be one in which goods are actually "exposed or kept for sale." If he have good reason to believe that it is so, and the entry be made *bonâ fide* under this belief, that will be sufficient. *Ibid.*

WITNESS.

See EVIDENCE, 8, 29.

1. A witness who is called in an action to depose to a matter of opinion, depending on his skill in a particular trade, has, before he is examined, a right to demand, from the party calling him, a compensation for his loss of time; and there is a distinction between a witness thus called,

- and a witness who is called to depose to facts which he saw. *Webb v. Page.* 23
2. A. and B. were indicted for burglary and stealing. A part of the stolen property was found in the house of each of the prisoners:—*Held*, that the wife of A. was a competent witness to prove that she took to B.'s house the stolen property that was found there. *Reg. v. Sills.* 494
 3. In an action against the sheriff for not taking a defendant on a ca. sa., the sheriff's officer to whom the warrant has been granted on the ca. sa. is a competent witness for the defendant, under the stat. 6 & 7 Vict., c. 65. *Wilson v. Magnay,* 291; *Wheeler v. Senior.* 293
 4. A witness who is subpoenaed by both parties in a cause is entitled to have all his expenses paid by the party who calls him at the trial, although the other party may have been the first who subpoenaed him. *Allen v. Yozull.* 315
 5. Whether, in an action on a joint contract, one of several defendants who has suffered judgment by default may, since the stat. 6 & 7 Vict., c. 85, be called by the plaintiff to prove the contract, *quære.* *Dresser v. Clarke.* 569, 752
 6. In replevin the defendant made cognisance; 1st, as bailiff of A. and B.; 2d, as bailiff of A.:—*Held*, that B. was not a competent witness for the defendant to sustain the second cognisance, though the defendant gave no evidence to sustain the first cognisance, and offered to abandon it. *Girdlestone v. M'Gowan.* 702

WOUNDING.

See ASSAULT, 2.

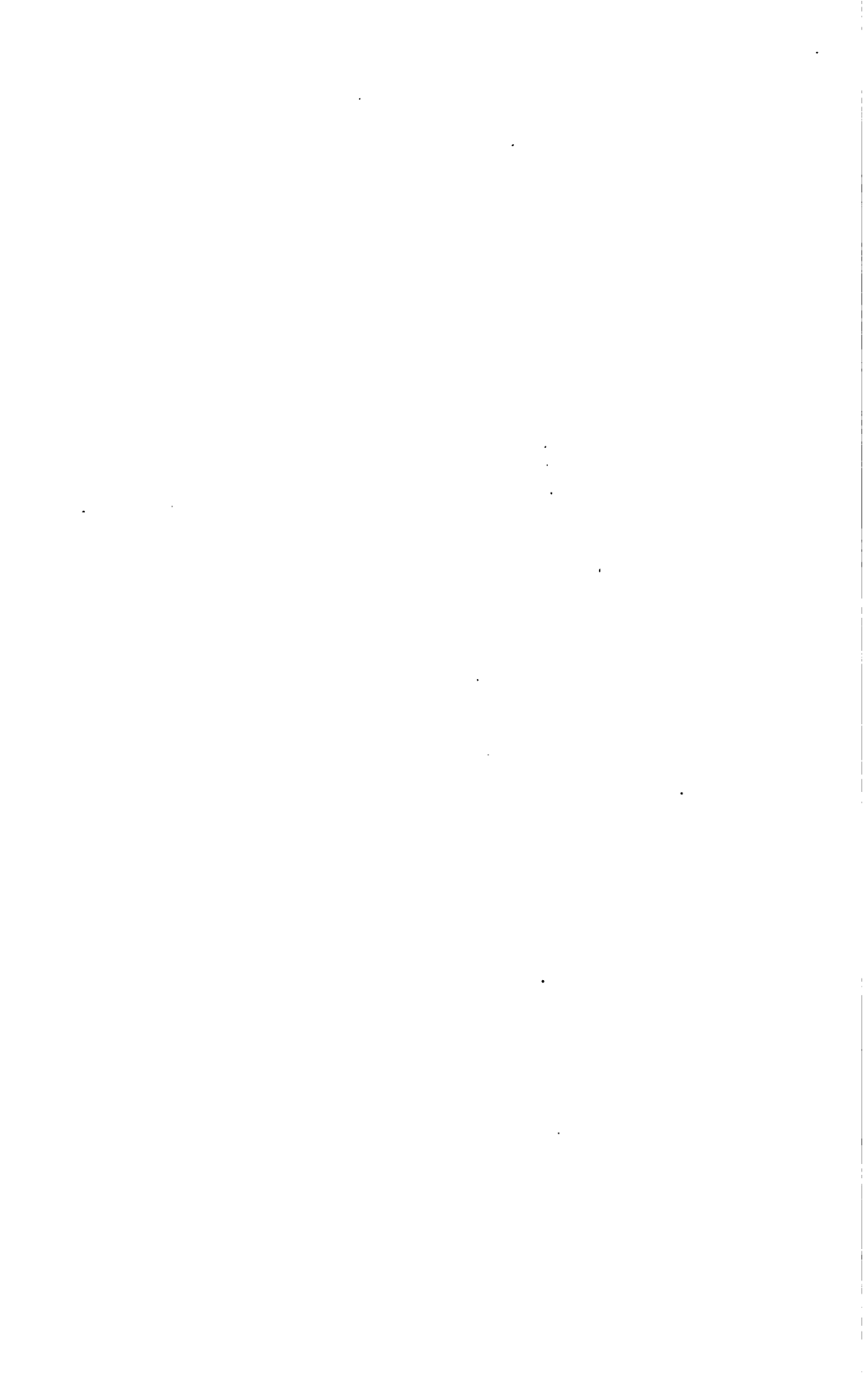
WOUNDING CATTLE.

See MAIMING CATTLE.

On an indictment on the stat. 1 Vict., c. 90, s. 2, for maliciously wounding cattle, it is not necessary to prove that the prisoner was actuated by malice against the owner of the cattle. *Reg. v. Tivy.* 704

WRIT OF TRIAL.

See PERJURY, 9.



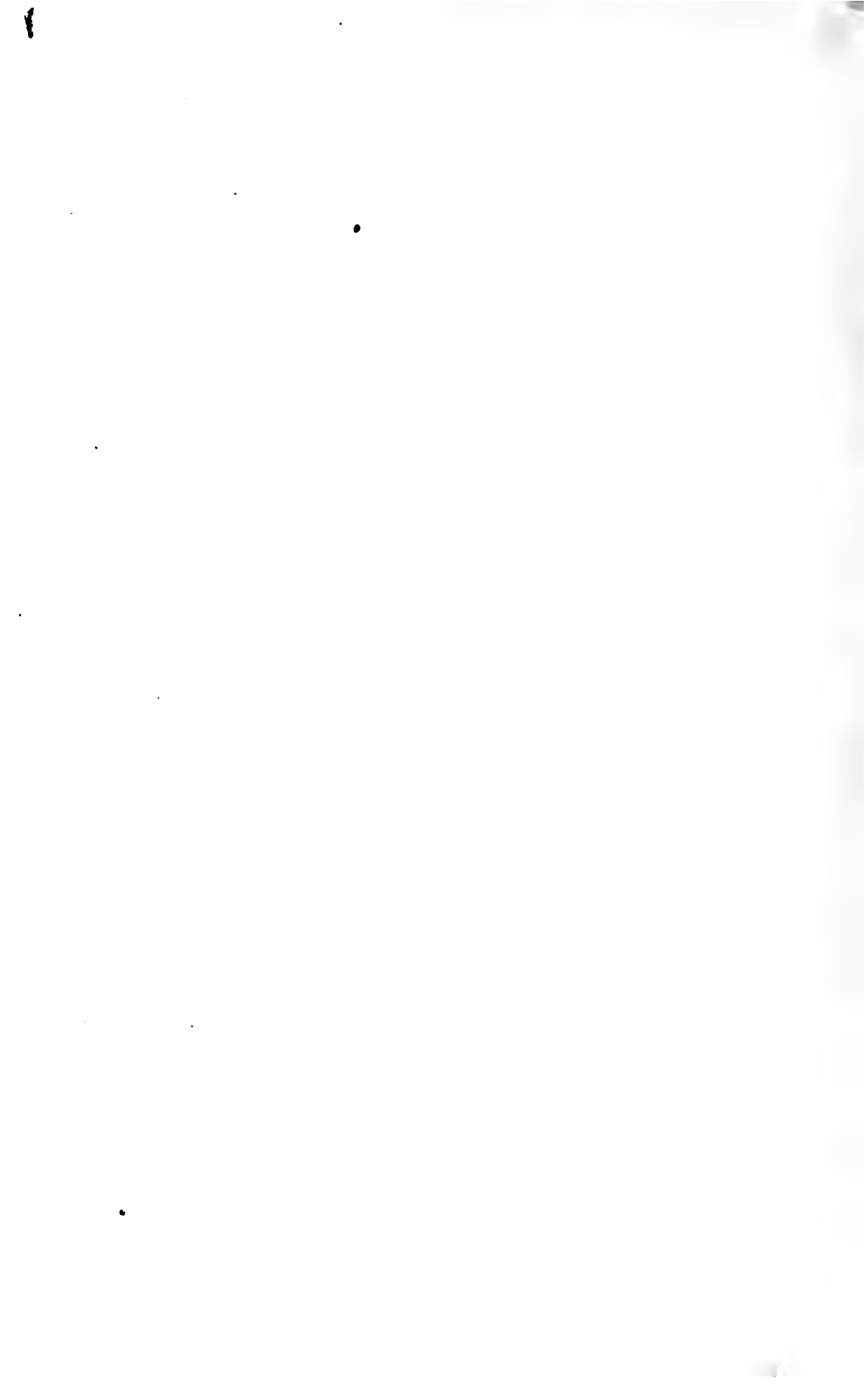


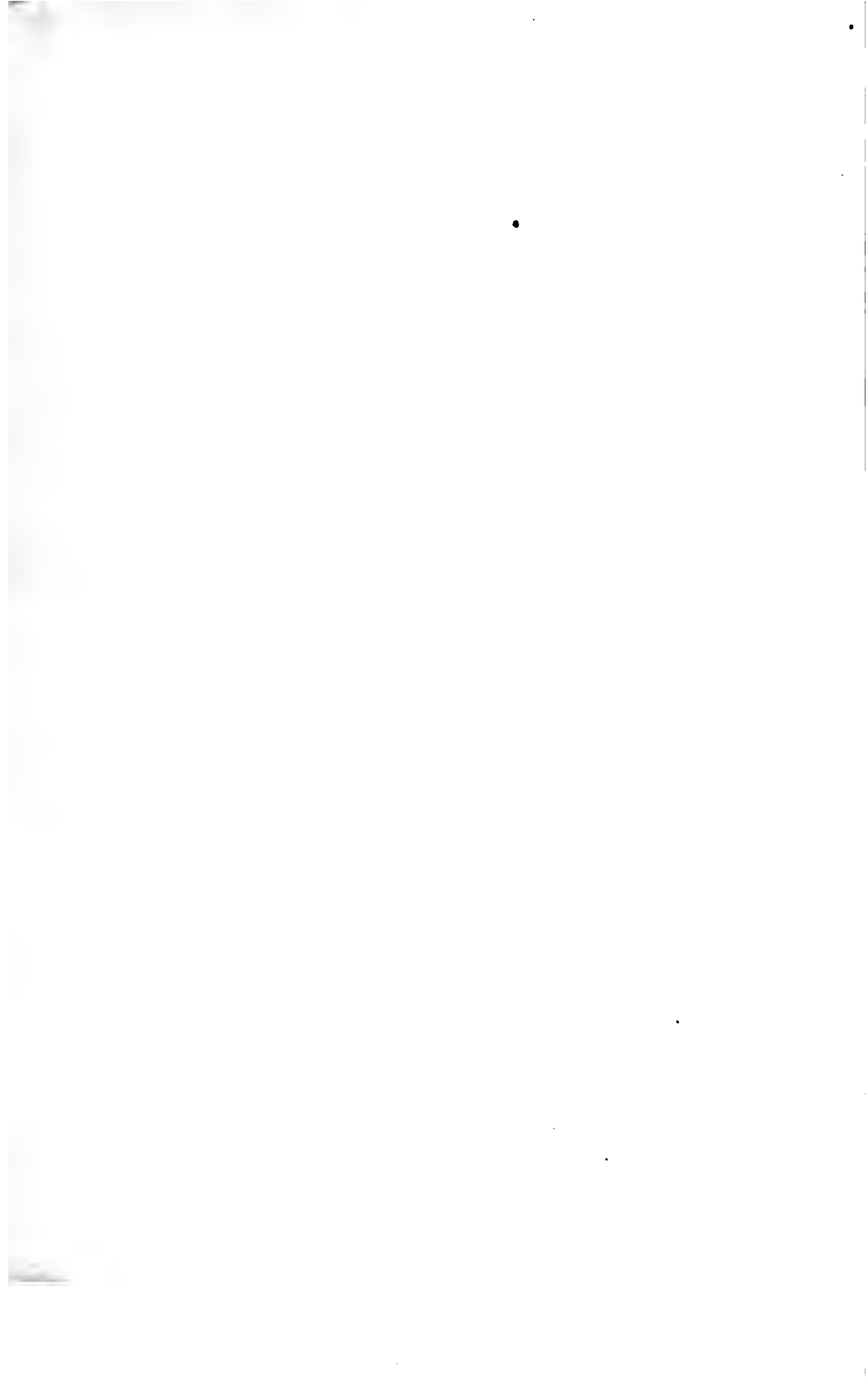




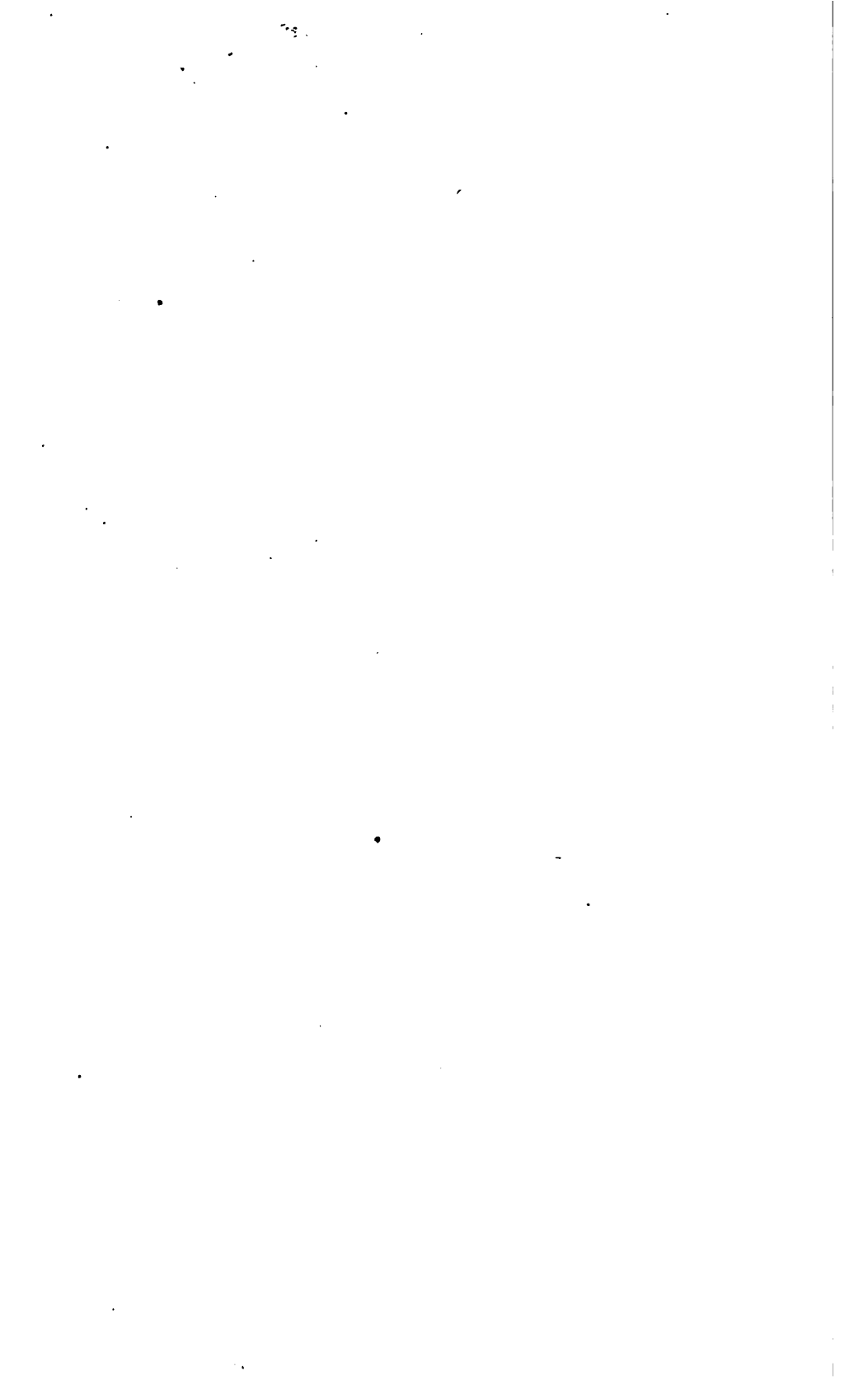










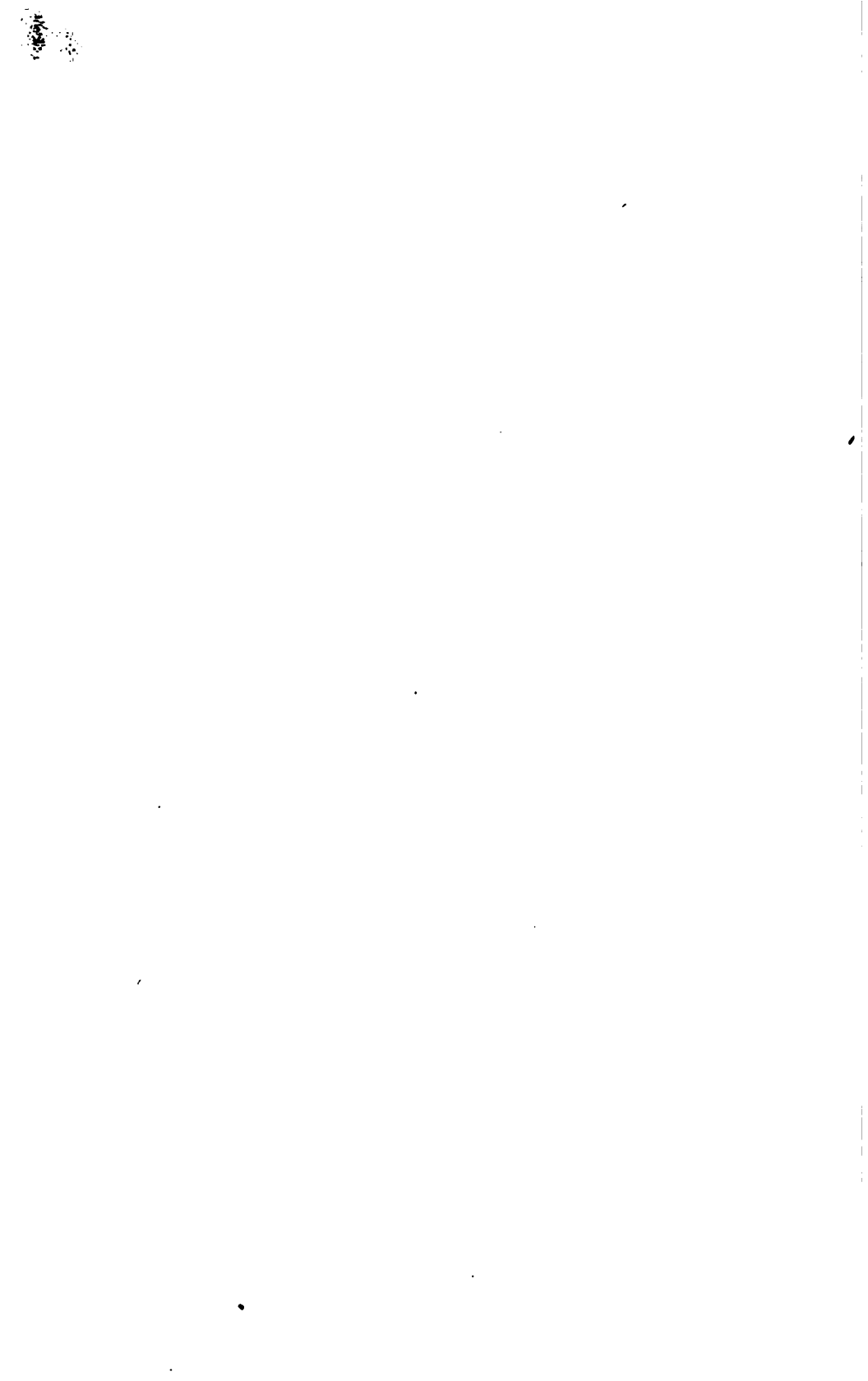


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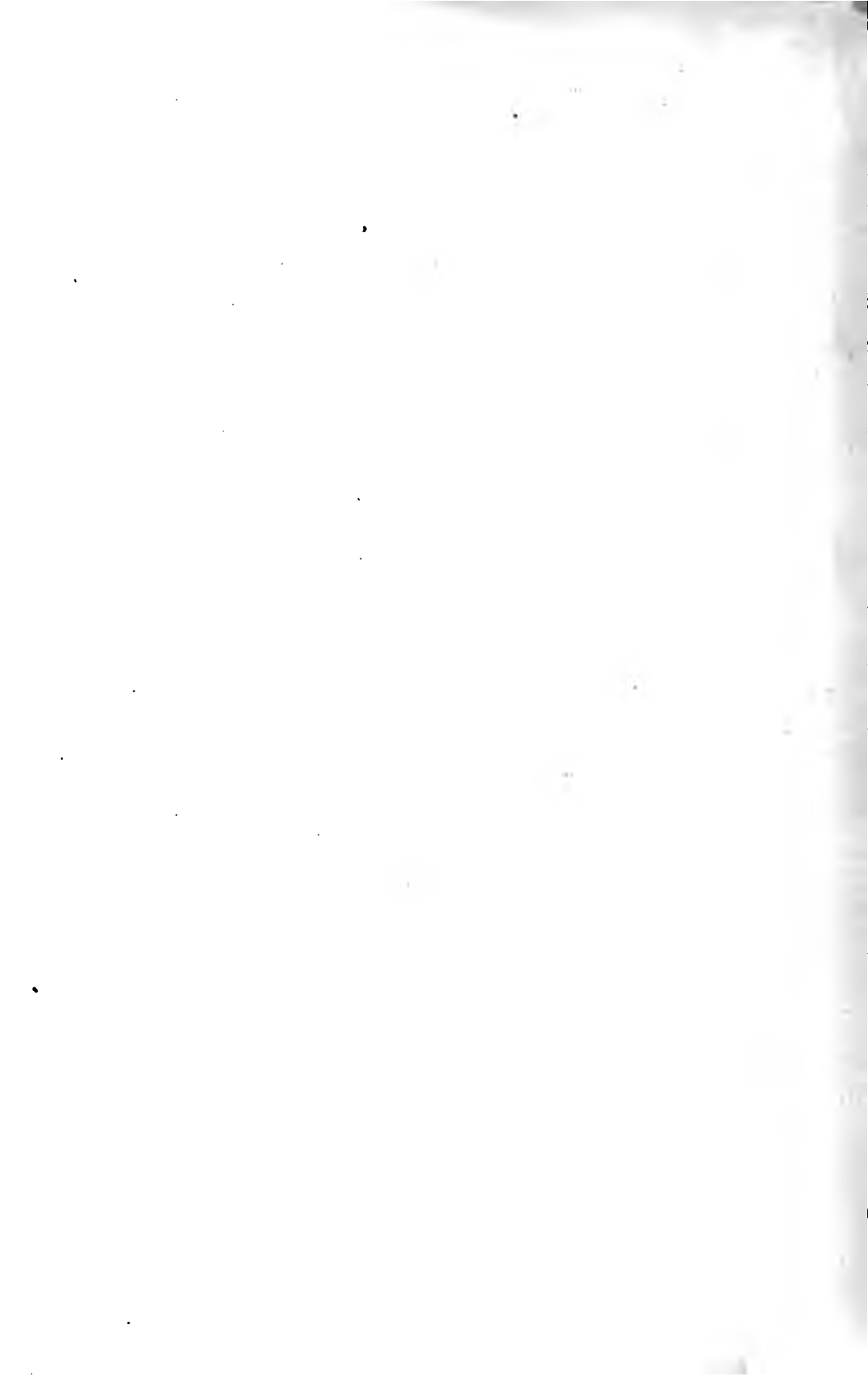


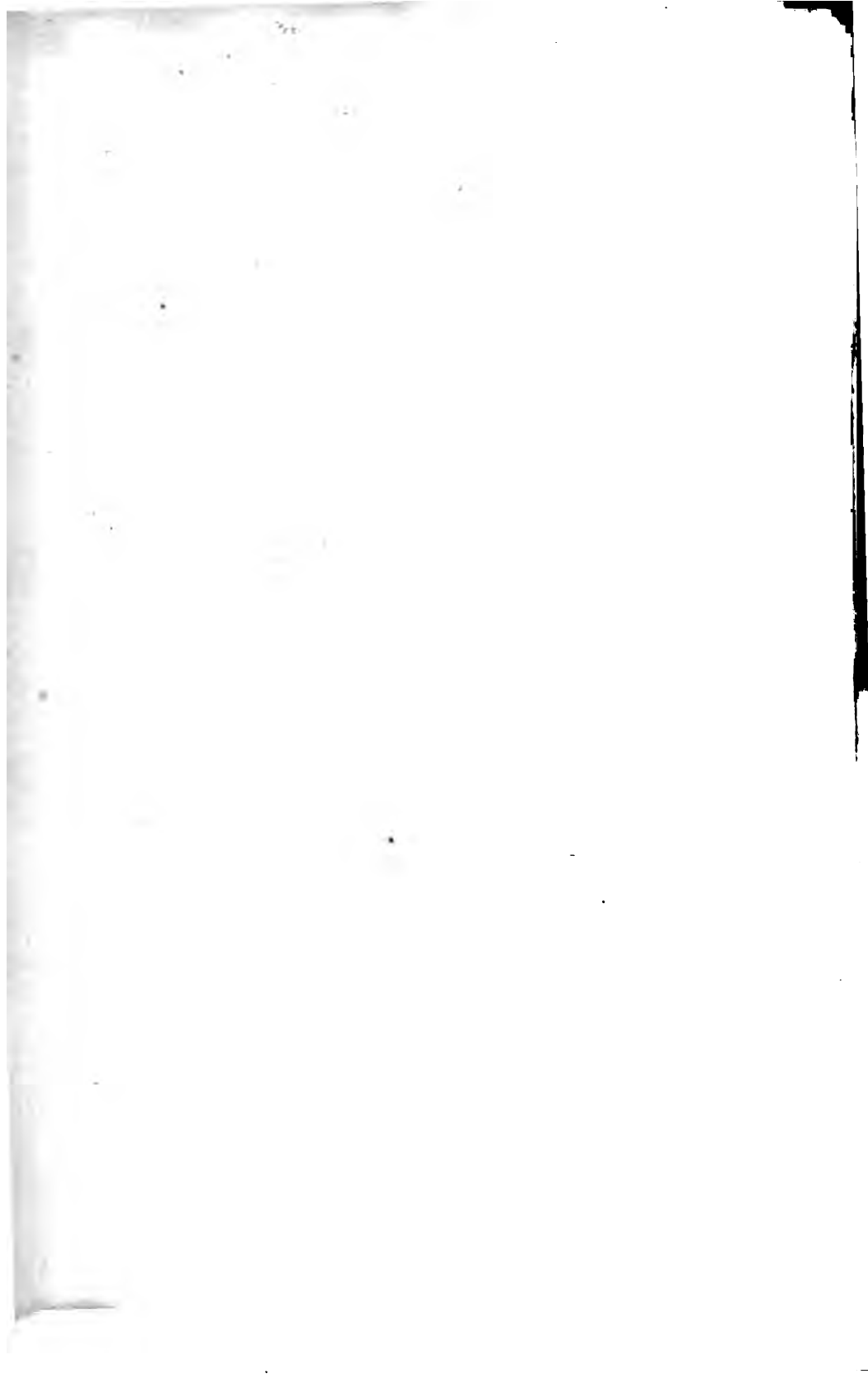












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